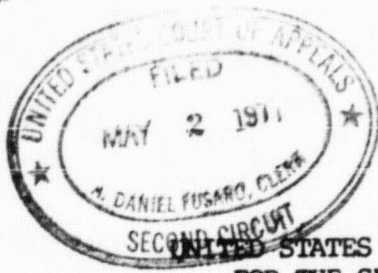


***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6012



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee-Cross-Appellant,

v.

PARKLANE HOISERY CO., INC.
HERBERT N. SOMEKH,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

Volume I

PAUL GONSON
Associate General Counsel

DANIEL L. GOELZER
Special Counsel

EDWARD A. SCALLET
Attorney

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

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DATE	NR.	PROCEEDINGS
		(PG # 2)
05-05-76	1	Filed complaint & issued summons
05-05-76	2.	Filed affdvt and order for appointment to effect service of summons
05-05-76	3	Filed pliffs affdvt. & notice of motion for a preliminary injunction
05-05-76	4	Filed pliffs memorandum in support of above motion.
05-05-76	(5)	Filed summons and return- accepted on behalf of defts. by Irving Barker (Jacob Persinger & Parker) on 05-05-76.
05-20-76	----	Before DUFFY, J. Conference held and concluded.
05-26-76	(6)	Filed pliff's memorandum in opposition to deftnotion to dismiss the complaint for failure to state a claim upon which relief can be granted.
5-28-76		case reassigned to Judge Ward. mn
6-2-76	---	Hearing begun on motion for prel. Inj.
6-3-76		Hearing cont d.
6-4-76	---	Hearing cont'd. and adjd to 6-7-76
6-7-76	---	Hearing cont d. and concluded...Decision reserved....Duffy, J.
6-17-76	---	Case reassigned to Duffy, J.
07-02-76	--	Filed transcript of record of proceedings, dated 6-2,3,4, 7-76
11-09-76		Filed reply memorandum of law in support of defts' motion to dismiss the complaint. (Filed in Court 6-2-76)
11-09-76		Filed Opinion # 45351 and Order-- for the reasons stated, deft. Parklane is directed to amend its prior filings with the SEC to correct the misstatements and non-disclosures referred to in this opinion. If 'arklane has not yet filed its Form 10K for 1975, it is ordered to do so. All other requested relief is denied. And I see no need for an injunction against future violation for deft. Somekh. So ordered- DUFFY, J. (m/n)
11-12-76		Filed Order-- that my Opinion and Order of 11-9-76 is amended to show appearances of defense counsel as indicated. So ordered- DUFFY, J. (m/n)
01-07-77		Filed defts' notice of appeal to the USCA from the Opinion and Order filed on 11-9-76, the findings of fact and conclusions of law contained therein and from the said Order directing deft. Parklane Hosiery Co., Inc. to amend its prior filing with the S.E.C. in accordance with the said Opinion.. Copy to: S.E.C., N.Y. Regional Office.. Ent. 01-10-77
01-21-77		Filed Pltff's Order to Show Cause why an order should not be issued requiring defts Parklane Hosiery Co. Inc. and Herbert Somekh to file forthwith amendments to their public filings with SEC pursuant to Opin & order etc. RET: January 13st, 1977 at 10:30AM Room 36.
01-21-77		Filed Pltff's Memorandum of Law in support of commission's order to show cause for an order and injunction.
01-21-77		Filed Pltff's Notice of Appeal to USCA 2nd Circuit from opinion and denying certain requested relief sought against Parklane. m-n to: Jacobs, Persinger & Parker, attys for defts, 70 Pine St. NYC 10005
01-23-77		Filed Defts Memorandum of Law in opposition to pltff's motion for an order(a) requiring Parklane Hosiery Company, Inc. to amend certain filings filed with pltff and (b) for other relief.
01-31-77	---	BEFORE DUFFY, CONFERENCE HELD AND CONCLUDED. :
02-04-77		Filed defts affidavit in opposition to pltff's motion.
02-04-77	--	Filed memo endorsed on motion filed on 1-21-77. The motion for an order directing defts to file amendments to their public filings in accordance with court's opinion and order of 11-9-76 is Granted. Defts are directed to make all such filings by 2-4-77. See minutes of 1-31-77 conference before me. Pltff's application is denied without prejudice. So ordered. Duffy, J. m/n.

(CONT'D - PG. #3)

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 76-2021
SECURITIES AND EXCHANGE COMMISSION	PARKLANE HOSIERY CO., INC, et o	PAGE 3 OF 3 PAGES

DATE	NR.	PROCEEDINGS (DUFFY, J.)
2-16-77		Filed true copy of USCA order that upon consideration of appellant's motion motion for a stay pending appeal, this action is reranded to the District Court for entry of a judgment under Rule 58 FRCP. (m/n)
3-09-77		Filed motion to dismiss complaint.
3-09-77		Filed defendant's memorandum of law in support of motion to dismiss complaint.
3-04-77		Filed defendant's designation of exhibits necessary for the determination of the appeal.
3-02-77		Filed transcript of record of proceedings, dated 1-31-77
3-08-77		Filed memorandum of law in support of defts' counter - proposed judgment.
3-08-77	✓	Filed Judgment and Order that debt Parklane and Somekh cause to be filed with the Commission, within (3) days of service upon them of a Certified copy of this Judgment and Order, amendments to all public filings made or caused to be made by defts since in or about Sept. 1974, etc. as indicated and that Court shall retain jurisdiction of this matter for all purposes. DUFFY, J. JUDGMENT ENTERED - 3-9-77. RAYMOND F. BURGHARDT, CLERK m-n
3-19-77		Filed NOTICE OF APPEAL of Defts Parklane Hosiery Co. Inc. and Herbert N. Somekh to USCA 2nd Circuit from Judgment filed 3-8-77. Mailed copy to: Securities and Exchange Commission, NY Regional Office, 26 Federal Plaza, NYC 10007,
3-11-77		Filed defts' affidavit of Irving Parker in support of application for a stay of judgment and order pending appeal. (filed in Court 3-10-77)
03-11-77		Filed memo endorsed on affidavit. filed 3-11-77. Motion denied. So ordered- DUFFY, J. (m/n)
03-10-77		BEFORE DUFFY, J. Conference held Re: defts' application for a stay of Judgment & Order dated 3-9-77. Stay is denied.
3-23-77		Filed plttf's notice of cross-appeal to USCA from the Judgment and Order entered on 3-9-77. Defts. have previously filed a notice of appeal from said Judgment on 3-10-77.. Copy to: Jacobs, Persinger & Parker. Ent. 3-23-77

CONTINUED ON PAGE NO. 4.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT		76 CIV 2004
S E C		PARKLANE HOSIERY CO., INC. ETAL		DOCKET NO. 4
				PAGE 4 OF 4
DATE	NR.	PROCEEDINGS		
03-23-77		DUFFY, J. Filed Order amending final judgment and order - that final judgment order in this action shall be in the form annexed hereto with said judgment & order reciting the following: as indicated and that Judgment and Order annexed hereto shall be deemed to have been signed and entered on the same dates, March 8, 1977 & March 9, 1977 respectively, as the prior judgment and order was signed. DUFFY, J. JUDGMENT ENTERED - 3-24-77. RAYMOND F. BURGHARDT, CLERK. m-n		

DC-111A REV. (1/75)

0000003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION,
:

Plaintiff,
:

-against-
:

PARKLANE HOSIERY CO., INC.
:

HERBERT N. SOMEKH,
:

Defendants.
:

OPINION AND ORDER

76 Civ. 2024

-----X
APPEARANCES:

WILLIAM D. MORAN, ESQ.

Regional Administrator, New York

Regional Office, Securities and Exchange Commission

Attorney for Plaintiff

By: Donald N. Malawsky, Esq.

Associate Regional Administrator

Franklin D. Ormsten, Esq.

Assistant Regional Administrator

Harry L. Garmansky, Esq.

Nadine S. Liebhardt, Esq.

Of Counsel

JACOBS, PERSINGER & PARKER, ESQS.

Attorneys for Defendants

By: Irving Parker, Esq.

Of Counsel

KEVIN THOMAS DUFFY, D.J.

This action is brought by the Securities and
Exchange Commission (hereinafter "SEC" or "the Commission")
against Parklane Hosiery Co., Inc. and Herbert N. Somekh

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under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) and Sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78m(a) and 78n(a) and the various rules promulgated thereunder. The SEC has moved this Court for a preliminary injunction against the ongoing violations and for ancillary relief to remedy those which it claims have already occurred. Rule 65, Fed.R.Civ.Proc.

Both parties have requested that the hearing on the preliminary injunction be consolidated with the trial of this action. Rule 65(a), Fed.R.Civ.Proc. That request is granted. This opinion will constitute findings of fact and conclusions of law as required by Rule 52, Fed.R.Civ.Proc.

The facts are relatively simple. The defendant, Herbert N. Somekh, was the guiding force behind the expansion of the corporate defendant Parklane Hosiery Co., Inc. which has approximately 400 retail outlets selling various articles of women's apparel..

At some point during December 1968, shares in Parklane Hosiery Co., Inc. were offered to the public pursuant to a complete registration with the SEC. Somekh, however, retained effective control of the corporation in that he and others affiliated with him owned 71.6 per cent

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of the stock. Apparently, after the public offering the price of the shares advanced, or at least remained firm, but with the recession which occurred thereafter, the price of the public shares was drastically reduced. The decision was made by Somekh and his affiliates to have the corporate defendant "go private" by purchasing the public shares. The mechanics of this was to have Somekh and those associated with him, transfer their shares to a new corporation called "New PLHC Corp." which would also attempt to obtain the outstanding public shares and eventually merge with the corporate defendant, thus eliminating the public shareholders. New PLHC Corp. effectively made the tender for the public shares. Proxy material was circulated which stated that there would be a meeting of the shareholders of the corporate defendant on October 14, 1974 for the purpose of considering and acting upon "a proposal to approve and adopt a plan of merger between the company and New PLHC Corp. pursuant to which the company will become a privately held company, and each outstanding share of common stock of the company (other than shares owned by New PLHC Corp.) will be exchanged for \$2 in cash" The proxy statement also indicated that the dissenting shareholders had the right to appraisal under the New York Business Corporation Law.

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The SEC's complaint is that the proxy statement did not go far enough in disclosing that the true underlying purpose of having Parklane Hosiery Co., Inc. go private was to bail out Herbert Somekh from certain personal transactions. The Commission also alleges that the proxy material was inadequate in that it failed to reveal that the corporate defendant was actively engaged in attempting to negotiate the release of a lease in lower Manhattan to the Federal Reserve Bank of New York, which release could have produced sizeable cash flow to the corporation. It is further charged that these facts were not disclosed to the appraisers. The Commission also seeks injunctive relief for the failure of Parklane Hosiery Co., Inc. to file certain 10-K reports and that certain other quarterly and annual reports which were filed were false and misleading in that they did not adequately disclose the purposes of the defendants in going private and the Federal Reserve Bank negotiations.

The SEC contends that Somekh and Parklane should now be enjoined:

" . . . it is requested that this Court (i) enjoin defendants Parklane and Somekh from further violations of the anti-fraud, proxy, and reporting provisions of the federal securities laws, (ii) order the appointment of a Special Counsel armed with all necessary powers and authority to make a determination as to the proper value of Parklane's stock, and as to the proper mode and

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extent of relief to be afforded former public Parklane shareholders, (iii) order Parklane to amend its prior public filings with the Commission so as to correct and adequately disclose all material matters relating to Parklane's financial and other affairs, (iv) order the defendant Parklane to file a Form 10K for the year ending September 30, 1975, and (v) order any other relief as to this Court shall deem necessary and appropriate."

Before considering the factual issues presented, it is helpful to note that this action is but one of five now pending regarding the Parklane-New PLHC merger. Although the information provided to me regarding the other actions is at best sketchy, it appears that a private action under Rule 10b-5 is now pending before Judge Wyatt of this Court, Shore v. Parklane Hosiery Co., Inc., 74 Civ. 4986, a class action in the Eastern District of New York, a class action in New York Supreme Court and an appraisal proceeding in Nassau County Supreme Court. It must also be noted that the SEC has not sought to challenge the act of going private as a per se violation of Rule 10b-5. See Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3222 (Oct. 4, 1976); Marshall v. AFW Fabrics Corp., 533 F.2d 1277, judgment vacated for possible mootness 45 U.S.L.W. 3279 (Oct. 4, 1976).^{1/}

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I. SOMEKH'S PERSONAL INDEBTEDNESS

Thomas E. Baggott, a vice-president of Bankers Trust Company, testified that sometime in 1971 the bank made a loan of \$750,000 to Parklane Hosiery and a two year personal loan to Mr. and Mrs. Somekh of \$900,000. The collateral for the personal loan consisted of the stock in Parklane held by Mr. and Mrs. Somekh, assignment or mortgaging of certain real estate, and assignment of other securities and negotiable instruments. Baggott testified that the collateral package exceeded \$2 million.

Sometime in late 1971 or early 1972, Mr. Somekh made a payment in the amount of \$80,000. No other payment was ever made and no attempt was made by the bank to foreclose on the collateral. On several occasions, Baggott urged Somekh to reduce the outstanding balance. Although Mr. Somekh met with bank officials to discuss selling certain of his properties, no such sales took place.

From January 1974 through that summer, Bankers Trust persisted in seeking a reduction of the outstanding balance. By March, an informal understanding had been reached that Somekh would sell off a mortgage note from the Rite-Aid Company and obtain a mortgage on his home in order to repay Bankers Trust. Although a buyer was found

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for the Rite Aid mortgage, the arrangement fell through, apparently due to practical and legal problems associated with the closing.

While repayment requests were being made by Bankers Trust, the National Bank of North America stepped up efforts to obtain payment from Somekh on a guarantee obligation in the amount of \$150,000. Somekh and three others had personally guaranteed a demand loan to a real estate partnership, 433 JV, of which each was a member. The bank had unsuccessfully sought repayment from Harold Strauss, one of the partners, in July 1973 and from Somekh in February 1974. On May 15, 1974, the bank wrote Somekh informing him that repayment was being demanded as of May 24, 1974, and that failure to repay by that date would result in legal action.

During the same period of time, Somekh had a demand note outstanding with First National City Bank (FNCB) in the amount of \$125,000. This loan was called in as of July 2, 1974. Since no payment was made an action was commenced in New York Supreme Court on September 20, 1974, Index No. 14881-1974.

Pressed with repayment demands, Somekh began to consider having Parklane go private. Somekh testified that he first gave thought to going private in late June or early

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July of 1974. About a month later, he began serious discussions with his attorneys, regarding the advisability and feasibility of such a course.

In or about August 1974, Baggott, Fried, another bank official, Somekh, and Somekh's accountant, had a meeting at which Somekh indicated that he intended to bring Parklane private as an alternative means of liquidating the personal obligation. These plans were reiterated to Baggott at a September 5th meeting with Somekh.

The proxy statement was issued as of September 24, 1974. On October 14, 1974 the merger converting the company to privately owned status took place.

Following the merger, at a December 30, 1974 meeting, Somekh's salary was increased from \$90,000 to \$150,000, retroactive to October 1973.^{2/} The Board authorized the corporate officers to purchase a parcel of land owned by Somekh in Pennsauken, New Jersey, and his interest in a limited partnership known as Riverbend Development Associates. The properties were purchased from Somekh for \$1.2 million.

Baggott testified that he began to receive payments from Somekh after the merger. A \$70,000 payment was

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made on December 6, 1974. A \$150,000 payment was received on December 31st. Thereafter, payments of \$25,000 a month were received until December 1975, when the remaining balance of \$355,000 was paid.

As to the outstanding indebtedness to FNCB, an agreement was reached on December 6, 1974 whereby Somekh would pay the sum of \$4,000 a month until the loan was fully repaid. The National Bank of North America dispute was resolved by a \$50,000 payment by Somekh sometime in November 1974.

The Commission contends that the proxy material inadequately discloses Somekh's true intention in proposing the merger: to bail out his personal financial situation. The defendants assert that the proxy statement does adequately disclose these facts and point to a paragraph under the section heading "Purpose and Background of Proposed Merger":

"If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all the assets, earnings, earning capacity and cash flow of the Company. The merger will make possible a combination of the resources of the Company with those of Mr. Somekh (who with his wife and trusts for the benefit of his children, owns approximately 86% of the stock of Newco) for the conduct of real estate activities of the type that Mr. Somekh has to date conducted individually (primarily development of garden apartments). Such a combination is presently being contemplated."

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It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the proxy statement. The non-disclosure is clearly established. The importance of this information to a shareholder, i.e., its materiality, is a separate question which will be considered at a later point in this opinion.

II. NEGOTIATIONS WITH FEDERAL RESERVE BOARD OF NEW YORK

The Commission has also alleged that the proxy material misrepresents the status of discussions concerning cancellation of a lease of property by Parklane from the Federal Reserve Board of New York (hereinafter "FRB"). Specifically, it is claimed that the assertion in the proxy statement that as to the FRB lease "there are no negotiations at present" is false and misleading as to a material fact.

Parklane had leased a parcel of land on the southeast corner of John and Nassau Streets in New York City from the FRB. The land was, in turn, subleased to a franchisee of Parklane and to a third party, Jo-Ray Foods, Inc.

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The FRB was in the process of constructing a building on that block and hired Robert S. Curtiss of Ely-Cruikshank Co., Inc. to negotiate a termination of the lease which had a natural expiration date of December 31, 1978. Curtiss testified that discussions with Parklane representatives began sometime in 1968 or 1969. Early on in the negotiations the FRB made an offer of \$500,000; a later, January 1970 proposal, included finding new locations for the sub-tenants. By May 16, 1974, the FRB made a ten day offer of \$800,000 to Parklane which would cover Parklane's interest and that of the sub-tenants.

The apparent stumbling block to a conclusion of the deal was the sub-tenant, Jo-Ray Foods. It had demanded at first \$1,200,000, later \$800,000, for cancellation of its interests alone. In June 1974, this demand was reduced to \$600,000. Seizing on this change of position, Somekh made a June 27 counter-offer to the FRB of \$1,200,000, which broke down into an allocation of \$600,000 to Jo-Ray, \$300,000 to the franchisee, and \$300,000 to Parklane; the offer by its terms expired July 10, 1974.

On July 1, Curtiss wrote to Somekh indicating his own disappointment with the June 27 offer but indicated that it would be submitted to the FRB. The FRB did not make any effort to accept the offer before its July 10, 1974 deadline.

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No significant activity transpired until October 4, 1974, when Curtiss telephoned Somekh to arrange a luncheon meeting at the Wall Street Club concerning the leasehold situation. Curtiss testified that he and Somekh indicated their mutual desire to get it resolved." Somekh reiterated his position that \$1,200,000 would be necessary to close the deal. Curtiss indicated to Somekh a change in his original opinion as to the merits of his proposal and that he would now be willing to recommend the \$1,200,000 figure to the FRB. Somekh agreed to accept \$300,000 as Parklane's share of the deal and to attempt to obtain assurances from Jo-Ray and the franchisee. On October 7, 1974, Curtiss wrote to William F. Treiber of the FRB recommending the Somekh offer.

No amendment was made to the proxy statement following the October 4 meeting. In determining whether the proxy material is false and misleading when it indicated that "there are no negotiations at present," an examination of the correspondence of the two parties to the October 4 meeting is revealing.^{3/} In his October 7 letter to Treiber, Curtiss prefaced his report with the following comment:

"Without now reviewing steps taken in this extended negotiating process as events have been reported to you, I present the current status following a long conference with Mr. Somekh previous to meeting with you last Friday afternoon October 4th."

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On October 29, Somekh wrote to Baggott to advise him of his progress with respect to the FRB situation:

"Also, and again this is off the record since until I have the money in my hand, I don't want to say that I have any deals, but I have had several conversations with the Federal Reserve and it seems that we may be heading towards a deal that would net Parklane \$300,000 that can close around the end of the year. I am keeping my fingers crossed since I realize what this would mean so let's both hope it gets done."

I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term "negotiation."^{4/} Thus, the unamended proxy material was false when it stated that "there are no negotiations at present." The materiality of the FRB negotiations will be discussed at a later point.

III. THE APPRAISAL

The third area in which the Commission alleges a failure to disclose facts which are material relates to the appraisal conducted by Thomson & McKinnon, Auchincloss and Kohlmeier, Inc. (hereinafter "Thomson & McKinnon"). Peter A. Russ, who was a vice-president of Thomson & McKinnon during the events in issue, testified that Somekh had retained the firm around August 12, 1974 to appraise the Parklane shares in connection with the merger.

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Russ indicated that three techniques were used in valuing the shares: first, the net worth and assets of the company were evaluated; second, the general industry outlook was analyzed and on that basis future earnings were estimated; and third, a cash flow evaluation was made. The final appraisal, although dated August 29, 1974, was submitted September 3. It valued the stock at \$1.78 per share.

Russ testified that at the time he conducted the appraisal he was not told and was not aware of Somekh's plans to use nearly \$1 million of corporate assets to reduce his personal indebtedness. He was equally unaware of Somekh's intention to sell real property to the corporation. At no time was Russ, or anyone else at his firm, informed of the negotiations with the Federal Reserve Board with respect to cancellation of the leasehold at Nassau and John Streets.

The Commission asserts that the proxy statement is misleading when it sets forth the fact of an appraisal by Thomson & McKinnon but fails to disclose that the appraisal was based upon inadequate and incomplete information. While such a claim would logically fall within Rule 10b-5, I do believe that Rule 14a-9 is broad enough to encompass the claim. The failure to inform Thomson &

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McKinnon these facts and the failure to disclose the defect in the appraisal in the proxy statement is beyond question.

IV. MATERIALITY

Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(a) prohibits the solicitation of proxies through the use of the mails or means or instrumentalities of interstate commerce unless the solicitation is in compliance with the rules and regulations of the Commission. Pursuant to that authority the SEC has promulgated Rule 14a-9 which provides in part:

"No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral, containing any statement, which, at the time and in the light of circumstances under which it was made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading"

I have already concluded that the proxy statement distributed by Parklane contains at least one misstatement and two omissions, but the inquiry does not end

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there. The Supreme Court has recently emphasized the importance of demonstrating that the false or omitted facts be truly material. The Court noted that too low a standard of materiality may result in liability for insignificant non-disclosures and encourage offerors to bury the shareholder in "an avalanche of trivial information" so as to avoid liability. TSC Industries, Inc. v. Northway, Inc., 44 U.S.L.W. 4852, (June 14, 1976).

The standard set forth by the Court requires more than speculation as to the importance of the misleading or omitted fact:

"The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills general description of materiality as a requirement that 'the defect have a significant propensity to affect the voting process.' It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

Id. at 4855 (footnote omitted).

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A determination of what a reasonable shareholder would consider important is more difficult where the proposed shareholder action is an acquisition of an ongoing business and the misstatement or omission relates to the attributes of the acquiring or target companies. There, a shareholder must decide whether the acquisition will enhance his investment. The distinction between what a single shareholder might subjectively consider important and that which would likely influence a reasonable shareholder can be subtle.

In the case before me, resolution of this question is simpler. Since the number of shares held by Somekh's family and associates were such that the merger and resulting elimination of public shareholders could not possibly be thwarted, the sole question facing a minority shareholder was whether to accept the \$2.00 per share price or to pursue his rights as a dissenting shareholder in an appraisal proceeding. If the shareholder is only called upon to evaluate the fairness of the per share offering price, then any omission or misstatement of fact which would affect the offering price must be material under the Northway test. Anything which would affect the price, upward or downward, would necessarily be important to the shareholder in making this decision. Proceeding one step further, an omitted or

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misstated fact which would have a substantial likelihood of affecting the price would, therefore, have a substantial likelihood of being considered important.

At trial, Russ testified that had he known that approximately \$1 million in corporate assets would be used to reduce Somekh's indebtedness, it would have affected the appraisal. Specifically, the company was evaluated solely in the specialty retail area and without consideration of a possible change in its liquidity through land acquisitions. Russ also indicated that had he known of the FRB negotiations, it would have prompted further inquiry. The possibility of a transaction which would have netted the company \$300,000 would have affected his appraisal in terms of his evaluation of cash flow. Russ testified that the fact that Parklane was merely negotiating with the FRB would not have excluded it from consideration in the appraisal.

As previously mentioned, the offering price was \$0.22 higher than the Thomson & McKinnon appraisal. At the August 29, 1974 meeting of the Board of Directors of Parklane, Somekh proposed the \$2.00 per share price. Stanley D. Robinson, an outside director, felt the price was inadequate and suggested between \$2.50 and \$3.00 per share. The minutes reflect that in supporting the \$2.00

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price, Somekh emphasized the Thomson & McKinnon appraisal.

Regardless of the degree of influence that the Thomson & McKinnon appraisal had on the final offering price, this Court has been presented with expert testimony, through Russ, which indicates that the omitted and misstated information bears directly upon one's ability to ascertain the fair value of the shares. Since I find that the omitted information would have had a substantial likelihood of affecting the price of the stock, a reasonable shareholder would have considered it important in deciding whether to vote to accept the \$2.00 per share price or pursue his appraisal remedy.

In finding materiality as to the FRB negotiations, I am mindful of the fact that evaluation of the importance of the non-disclosure of an anticipated event requires:

" . . . a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) Here, however, there is an affirmative misstatement rather than a non-disclosure. Had there been no falsity involved, the situation might have been different.^{5/}

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At first glance, misstatements regarding a transaction which could at most net the corporation \$300,000 might appear to be of doubtful materiality. See SEC v. Pausch & Lomb, Inc., 73 Civ. 2453 (S.D.N.Y. Sept. 16, 1976) at 14. But in gauging their significance in terms of shareholder action, it must be kept in mind that the net earnings per year for the entire Parklane "empire" for the five years preceding the merger never exceeded \$533,000.

In regard to the information withheld from Thomson & McKinnon, a minority shareholder who is faced with the task of evaluating the fairness of the per share price offered by the majority will place great weight upon an independent appraisal as revealed in the proxy statement. If that appraisal was conducted based on faulty or insufficient information, the shareholder is in a worse situation than if no appraisal were made or disclosed. He may be lulled into believing he has a valuable tool when in fact he has a meaningless nothing. When the omissions and misstatements heretofore outlined are viewed in terms of what truthful information has been disclosed, I come to the conclusion that these deficiencies are material.

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V. RELIEF

Congress has authorized the SEC to seek injunctive relief "[w]henver it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute a violation of this chapter, or of any rule or regulation thereunder" 15 U.S.C. § 78u(e). In demonstrating the need for injunctive relief, the SEC is not required to show the same likelihood of irreparable harm which would be required from a private litigant. SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). Cf. SEC v. Bausch & Lomb, Inc., *supra*. But in the final analysis general equity principles do control and establishing the wrong will not necessarily establish the right to the requested relief. 515 F.2d at 807. See SEC v. Geon Industries, Inc., 531 F.2d 39, 56 (2d Cir. 1976).

As noted in the introduction to this opinion, the SEC has requested, inter alia, the appointment of a special counsel to determine the fair value of the Parklane shares and for an injunction against future violations by defendants. In this regard I find it significant that a year and a half has elapsed from the date of the violation to the Commission's request for injunctive relief. The delay belies the claim of pressing need for the relief. See SEC v. Keller

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Industries, Inc., 342 F.Supp. 654, 660 (S.D.N.Y. 1972)
(Gurfein, J.).^{6/}

To appoint a special counsel for the purpose of determining the fair value of the Parklane shares is to assume that the appraisal proceeding pending in New York Supreme Court will fail in its effort to arrive at a just and equitable price. I will not make such an assumption. Counsel for the SEC has suggested that a special counsel could be empowered to determine and pay out the difference between the true fair value and that paid to the shareholders who did not dissent. In light of the three other private actions; which are separate and apart from the appraisal proceeding and this case, I find relief of that nature to be wholly unnecessary.^{7/} The appointment of special counsel, receiver or trustee is a useful remedial tool, but this is not the proper case for it. See SEC v. Shapiro, 494 F.2d 1301, 1309 (2d Cir. 1974); SEC v. S & P National Corp., 360 F.2d 741, 750 (2d Cir. 1966); see also Proceedings of the Conference of the North American Securities Administrators, 1972, at pp. 95-96.

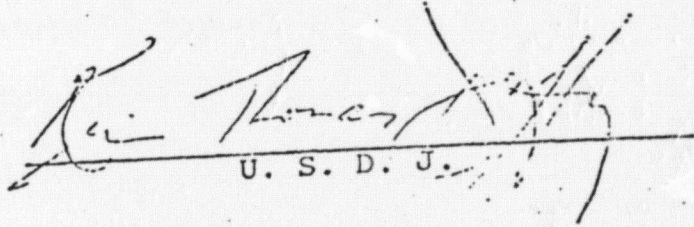
Turning to the request for an injunction against future violations, the "critical question" is whether "there is a reasonable likelihood that the wrong will be repeated." SEC v. Manor Nursing Centers, Inc., 458 F.2d

1082, 1100 (2d Cir. 1972). While "the commission of past illegal conduct is highly suggestive of the likelihood of future violations," the "totality" of circumstance" must be examined. SEC v. Management Dynamics, 515 F.2d at 807. Herbert Somekh is not a securities broker or dealer. Apart from his role in Parklane, his involvement with the securities market has been as an investor. While I do believe his violation of Section 14(a) and that of his company were knowing thus meeting the statutory requirements, I also feel that it was an isolated occurrence. No one has suggested to me that there was any impropriety connected with the 1968 public offering or any other securities transaction in which Somekh or Parklane were involved. An injunction is intended to prevent further violations and not to punish for those that have already occurred. SEC v. Geon Industries, Inc., 531 F.2d at 56. Accordingly, I see no need for an injunction against future violations as to Somekh.

Parklane is directed to amend its prior filings with the SEC to correct the misstatements and non-disclosures referred to in this opinion. If Parklane has not yet filed its Form 10K for 1975, it is ordered to do so. All other requested relief is denied.

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SC ORDERED.


U. S. D. J.

Dated: New York, New York
November 9, 1976.

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FOOTNOTES

- 1/ It is entirely possible that the Commission's decision not to challenge the merger on this ground is based upon concern over the continued viability of these cases in light of Ernst & Ernst v. Hochfelder, 44 U.S.L.W. 4419 (1976). This Court has been advised that one or more of the private actions do raise this attack. In any event, the case was not tried on that theory and my decision does not hinge thereon.
- 2/ Although this action had originally been approved at a September 16, 1974 meeting of the Executive Committee of Parklane, no mention of it is made in the proxy statement.
- 3/ Of course, the characterizations by Curtiss are not binding on Somekh or Parklane but they do constitute some evidence of what in fact occurred.
- 4/ See Webster's New Twentieth Century Dictionary (unabridged Second Ed. 1970) defining negotiation as "a conferring, discussing, or bargaining to reach an agreement as in business transaction or state matters."
- 5/ Although Curtiss testified that negotiations continue to the present day, it must be noted that the FRB deal has never been concluded. This, of course, does not necessarily affect the materiality of the misstatement. Once Parklane learned that the SEC was investigating these negotiations, it is entirely possible that it chose not to close the deal.
- 6/ I am not unmindful that often delays in SEC proceedings are caused by the difficulties of investigation, the myriad documents to be examined, and the prime consideration of the staff and of the Commission of the rights of possible defendants. The case cited,

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FOOTNOTES, continued

6/ for example, is one which I can personally attest
cont. reflects all of these factors. I am sure that
the case at bar most likely tracks the same care
and consideration.

7/ Counsel for the petitioners in the appraisal pro-
ceeding has indicated to this Court that substan-
tial progress has been made:

"The hearings before Appraiser Fink
have extended for nearly a year, includ-
ing discovery. Nearly 2,700 pages of
transcript and 140 exhibits already have
been introduced in evidence on the ques-
tion of the fair value of the stock at
the time Parklane went private. Extensive
testimony relating to the work of Park-
lane's auditors is in the record, as well
as testimony by its principal officers."

May 11, 1976 letter of A. Wisheart and F. Cuccia.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION	:	76 Civil 2024
	:	(KTD)
Plaintiff,	:	
- against -	:	
PARKLANE HOSIERY CO., INC.	:	<u>JUDGMENT AND ORDER</u>
HERBERT N. SOMEKH	:	
Defendants.	:	

Plaintiff, Securities and Exchange Commission ("Commission") having duly commenced this action by filing its complaint on May 5, 1976 seeking injunctive and other ancillary relief against defendants Parklane Hosiery Co., Inc. ("Parklane") and Herbert N. Somekh ("Somekh"), and the parties to this action having been heard before this Court in a trial on the merits, and this Court having issued an Opinion and Order of November 9, 1976, pursuant to Rule 52 of the Federal Rules of Civil Procedure containing Findings of Fact and Conclusions of Law, and this Court having found that the defendants Parklane and Somekh knowingly violated Section 17(a) of the Securities Act of 1933 and Sections 10(b), 13(a), and 14(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 13a-1, 13a-13, 14a-3 and 14a-9 promulgated thereunder, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant Parklane file, and defendant Somekh cause to be filed with the Commission, within three (3) days of service upon them of a certified copy of this Judgment and Order, amendments to all public filings

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made or caused to be made by defendants Parklane and Somekh since in or about September, 1974, including, but not limited to, defendant Parklane's proxy statement dated September 24, 1974, and its Form 10K reports for the fiscal years ending September 30, 1974 and 1975.

IT IS FURTHER ORDERED that the amendments to the aforementioned public reports, filings and proxy statements shall, among other things, reflect the fact that:

- (1) the overriding purpose for the change of Parklane from the status of a public to a private corporation was to enable the defendant Somekh to use Parklane's assets to repay a personal indebtedness;
- (2) that before, during and after the preparation and dissemination of defendant Parklane's proxy statement dated September 24, 1974, defendant Parklane, and defendant Somekh on its behalf, were engaged in negotiations with the Federal Reserve Bank for the cancellation of a leasehold interest held by defendant Parklane in return for monetary benefits; and
- (3) that Thomson, McKinnon, Auchincloss & Kohlmeyer, the appraiser of the common stock of Parklane, was given insufficient information upon which to base a valuation of Parklane's common stock in that such appraiser was not, among other things, told that (a) defendant Somekh was to

sell personal real estate holdings to defendant Parklane immediately subsequent to Parklane's return to a private company, and (b) that defendant Parklane and defendant Somekh, on its behalf, were engaged in negotiations with the Federal Reserve Bank for the cancellation of a leasehold interest of Parklane for which defendant Parklane would receive monetary benefits.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Commission's application for a final judgment of permanent injunction against the defendants Parklane and Somekh is hereby denied, and all other relief requested by plaintiff Commission is hereby denied.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this matter for all purposes.

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 8, 1977

JUDGMENT ENTERED: March 9, 1977

CLERK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 23 1977
S.D. N.Y.

SECURITIES AND EXCHANGE COMMISSION	:	76 Civ. 2024 (KID)
Plaintiff,	:	
- against -	:	
PARKLANE HOSIERY CO., INC.	:	ORDER AMENDING FINAL
HERBERT N. SOMEKH	:	JUDGMENT AND ORDER
Defendants.	:	

Plaintiff, Securities and Exchange Commission ("Commission") having duly commenced this action by filing its complaint on May 5, 1976 seeking injunctive and other ancillary relief against defendants Parklane Hosiery Co., Inc. ("Parklane") and Herbert N. Somekh ("Somekh"), and the parties to this action having been heard before this Court in a trial on the merits, and this Court having issued an Opinion and Order on November 9, 1976, pursuant to Rule 52 of the Federal Rules of Civil Procedure containing Findings of Fact and Conclusions of Law, and this Court having signed a Judgment and Order on March 8, 1977, and said Judgment and Order having been entered by the Clerk of this Court on March 9, 1977, and said Judgment and Order having failed to state that plaintiff Commission's application for permanent injunctive relief and other ancillary relief against the defendants herein was denied by this Court, and all parties herein to this action having had notice of this matter, it is hereby

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ORDERED that the Final Judgment and Order in this action shall be in the form annexed hereto with such Judgment and Order reciting the following:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Commission's application for a final judgment of permanent injunction against the defendants Parklane and Smith is hereby denied, and all other relief requested by plaintiff Commission is hereby denied.

IT IS FURTHER ORDERED that the Judgment and Order annexed hereto shall be deemed to have been signed and entered on the same dates, March 8, 1977 and March 9, 1977 respectively, as the prior Judgment and Order was signed.

/s/ Kevin Thomas Duffy
UNITED STATES DISTRICT COURT

Dated: New York, New York
March 9, 1977

more pro tunc

JUDGMENT ENTERED 3/20/77

/s/ Raymond T. Burchard
CLERK

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SEC v. Parklane - Corrections to trial transcript

<u>Page</u>	<u>Line</u>	
2	22	Change "not" to "Note"
5	14	Change "comstume" to "costume"
8	9	Change "77" to "72"
11	15	Delete "of" after "word"; add "is" after "it"; and change "is" to "was"
12	5	Change "propper" to "proper"
12	22	Add "there" before "is"
21	7	Change "odes" to "does"
28	18	Change "export" to "corporate"
63	3	Change "courst" to "course"
63	14	Change "knumerable" to "Innumcrable"
70	21	Change "accountants" to "accounta"
75	17	After the comma, insert a dash and change "1,367,719" to "2,367,719"
92	10	Before "if" add "MR. PARKER:"
95	24	Change "Germaney" to "Germansky"
114	14	Change "not" to "Not"
137	10	Add quotation mark before "MR."
164	3	Change "minue" to "mine"
177	6	Change "15th" to "5th"
180	9	Change "20" to "1" and after "million" add "one hundred thousand"
181	22	Change "Keshaum" to "Kezsbom"
186	6	Change "actively" to "adequately"
190	7	Change "1488" to "14881/4"
192	18	Change "limits said" to "limiteds"

<u>Page</u>	<u>Line</u>	
194	16	After "I" add "have"
197	3	Change "27" to "28"
208	15	Change "eyes" to "assistant"
257	21	Change "grany" to "grant"
263	21	Add "MR. PARKER:" before "I think"
294	10	Change "immaterial" to "immateriality"
294	12	Change "21" to "24"
299	2	Change "\$57,500" to "\$37,500"
305	8	Change "poing" to "point"
310	11	Change "beinding" to "binding"
314	10	Change "320" to "32 for 10"
355	2	After "fact" delete "just had" and add "used"
361	21	Change "21" to "24"
379	18	Change "and" to "which"
391	2	Change "paople" to "people"
402	20	Change "Schler" to "Scholer"
404	24	Change "issuc it" to "it is"
416	21	Change "had" to "that"
425	7	Delete quotation mark before "and" and insert quotation mark before "there"
427	22	Change "bill" to "build"
433	20	Change "before" to "believe"
434	8	Change "10B5" to "10b-5"
434	14	Change "Whatt" to "Wyatt"

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 76 Civ. 2024

PARKLANE HOSIERY CO., INC., :

HERBERT N. SOMEKH, :

Defendants.

----- x

Before:

HON. KEVIN THOMAS DUFFY,

District Judge

New York, June 2, 1976

Room 906 - 11:20 a.m.

APPEARANCES

William D. Moran, Regional Administrator,
Securities and Exchange Commission,

By: Franklin Ormsten, Esq.

Nadine Liebhardt, Esq.

Harry Garmansky, Esq.

Jacobs, Persinger & Parker, Esqs.,

Attorneys for Defendants,

By: Irving Parker, Esq.

Joseph Salomon, Esq.

David Birk, Esq.

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2 (Case called.)

3 THE COURT: I have not had a chance to read
4 the reply memorandum of law which is going to be marked
5 Filed with the Court.

6 Have you received a copy of it?

7 MR. GARMANSKY: Yes, we have, your Honor.

8 THE COURT: I will read it over the lunch break.
9 Can't we get started on the hearing at least? I understand
10 there is one witness that we put it off for and is he here?

11 MR. GARMANSKY: Your Honor, that witness is
12 here.

13 THE COURT: Call him.

14 MR. GARMANSKY: Before we call Mr. Somekh as our
15 first witness, we would like to move before this Court
16 to have a consolidation under Rule 65-A-2. We feel we
17 would have enough proof at the end of this hearing in order
18 to merit the consolidation.

19 THE COURT: I will reserve on that.
20 After the end of the hearing we will figure out whether
21 you have enough proof or not.

22 MR. PARKER: May we not our opposition, your
23 Honor?

24 MR. LIEBHARDT: Your Honor, we would like to
25 present our opening statement for the plaintiff.

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2 THE COURT: I read your papers. You don't need
3 one.

4 Call your first witness.

5 MR. GARMANSKY: The Commission calls Mr. Somekh.

6 THE COURT: Is there any possibility as to
7 stipulations as to anything in this case?

8 MR. GARMANSKY: Not at this time, your Honor.

9 H E R B E R T N. S O M E K H, called as a witness
10 on behalf of the Securities and Exchange Commission,
11 being first duly sworn, testified as follows:

12 MR. GARMANSKY: In light of the fact Mr. Somekh
13 is a named defendant, we would request the Court to advise
14 Mr. Somekh of his constitutional rights.

15 THE COURT: Mr. Somekh, do you have an attorney
16 with you here?

17 THE WITNESS: Yes.

18 THE COURT: Who is it?

19 THE WITNESS: Mr. Irving Parker.

20 THE COURT: Mr. Parker, have you discussed this
21 matter with your client?

22 MR. PARKER: His rights, your Honor?

23 THE COURT: Yes.

24 MR. PARKER: He has been advised of them
25 previously and he is aware of his rights and he acknowledged

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Somekh-direct

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2 that this morning.

3 THE COURT: He did?

4 MR. PARKER: Yes.

5 THE COURT: You know about the right of self-
6 incrimination?

7 THE WITNESS: Yes.

8 THE COURT: You can refuse to answer any
9 question if you feel it is going to incriminate you. Do
10 you understand that?

11 THE WITNESS: Yes.

12 THE COURT: You have your own attorney here?

13 THE WITNESS: Yes.

14 THE COURT: Would you like to have him stand
15 beside you?

16 THE WITNESS: No. He can stay where he is.

17 THE COURT: All right.

18 THE WITNESS: As he pleases.

19 THE COURT: You are making it easy. It is
20 all right.

21 DIRECT EXAMINATION

22 BY MR. GARMANSKY:

23 Q What is your home address?

24 A 19 Dorset Road, Great Neck, New York.

25 Q Where are you employed, sir?

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Somekh-direct

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2 A Parklane Hosiery Company.

3 Q Where is Parklane Hosiery Company located?

4 A 1540 Union Turnpike, New Hyde Park, New York.

5 Q I will hereinafter refer to Parklane Hosiery as
6 Parklane.

7 What is your position?

8 A President and chairman of the board.

9 Q How long have you held that?

10 A Since Parklane has been in inception 1946.

11 Q Would you briefly describe Parklane's business?

12 A Parklane's business is the retailing of ladies'
13 items such as hosiery, panty hose, leotards, tights, tops,
14 gloves and costume jewelry.

15 Q Did Parklane ever make a public offering of
16 its stock?

17 A Yes, sir.

18 Q When was that?

19 A 1968.

20 Q How many shares were offered and sold to the
21 public?

22 A 300,000 shares.

23 Q Do you recall at what price those shares were
24 sold?

25 A \$9.

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Somekh-direct

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2 Q Subsequently, the stock became listed and traded
3 on the American Stock Exchange, is that correct?

4 A Yes.

5 Q In or about October 1974, Parklane's stock was
6 delisted from the American Stock Exchange, is that cor-
7 rect?

8 A Yes, sir.

9 MR. GARMANSKY: I would like to mark as
10 Plaintiff's Exhibit 1, the proxy statement of Parklane
11 Hosiery.

12 (Plaintiff's Exhibit 1 was marked for
13 identification.)

14 Q Mr. Somekh, do you recognize Plaintiff's Exhibit
15 1?

16 A Yes, sir.

17 Q This is the proxy statement of Parklane mailed
18 to the shareholders of Parklane which called for a special
19 meeting to vote whether or not to return Parklane to the
20 status of a private company; is that correct?

21 A Yes, sir.

22 Q Did you read Plaintiff's Exhibit's 1 at or
23 about the date indicated on it, September 24, 1974?

24 A Yes, sir.

25 Q At the time of Plaintiff's Exhibit 1, how many

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Somekh-direct

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2 shareholders were there?

3 A I don't know.

4 Q Was it more than 100, Mr. Somekh?

5 A Yes, sir.

6 Q Was it more than 500?

7 A I am not so sure. It must have been. I don't
8 know.

9 Q Are you familiar with a company called New
10 PLHC Corp.?

11 A Yes, sir.

12 Q That company, plhc was used as the vehicle
13 to bring Parklane to the status of a private company,
14 is that correct?

15 A Yes, sir.

16 Q Were you an officer or director of New PLHC
17 Corp.?

18 A I am sure I must have been since it was formed
19 on my behalf by my attorneys.

20 Q Do you recall whether or not you were an officer
21 or director?

22 A On a first-hand fact basis, no, sir.

23 Q What happened to New PLHC Corp. after the merger
24 between itself and Parklane?

25 MR. PARKER: Objection as to form. The question

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Somekh-direct

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2 is very general, yourHonor.

3 THE COURT: Yes, it is. Rephrase it.

4 Q Is New PLHC Corp. in existence today?

5 A I don't know, sir.

6 Q You have no knowledge?

7 A No, sir.

8 Q Is it a fact certain individuals besides yourself
9 transferred 77 percent equity ownership to PLHC Corp.?

10 A We transferred the stock we owned to New PLHC
11 Corp. What percentage that constitutes, I can't really
12 tell you exactly.

13 Q Isn't it a fact, sir, you and several other
14 individuals own a controlling interest of Parklane, that is,
15 over two-thirds control?

16 A It is a fact.

17 Q Mr. Somekh, after the transfer by yourself and
18 others to New PLHC Corp. of your Parklane stock, how many
19 equity ownership did you have of New PLHC Corp.?

20 A I don't know.

21 Q Isn't it a fact it was approximately 38 percent?

22 A If that is what is stated in the record,
23 it must have been so.

24 Q Do you have knowledge of that?

25 A No, sir.

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Somekh-direct

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2 Q Plaintiff's Exhibit 1 called for a shareholders
3 meeting on or about October 14th in order to vote on the
4 proposed merger between New PLHC Corp. and Parklane?

5 A Yes.

6 THE COURT: What year?

7 MR. GARMANSKY: Pardon, your Honor?

8 THE COURT: What year?

9 MR. GARMANSKY: 1974.

10 Q Pursuant to this proposed merger, is it not true
11 that all Parklane stockholders except New PLHC Corp. share-
12 holders were to receive either \$2 per share for the
13 Parklane stock or to dissent and seek appraisal?

14 MR. PARKER: I object to the nature of the
15 inquiry. He is inquiring about a document which speaks
16 for itself..

17 THE COURT: I was hoping someone was going
18 to offer it.

19 MR. PARKER: That being the case, I respect-
20 fully object.

21 THE COURT: Is someone going to offer it in
22 evidence?

23 MR. GARMANSKY: Plaintiff offers Plaintiff's
24 Exhibit 1 into evidence.

25 MR. PARKER: No objection.

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Somekh-direct

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2 THE COURT: Mark it in evidence.

3 (Plaintiff's Exhibit 1 was received in
4 evidence.)

5 Q Isn't it correct the purpose of Plaintiff's
6 Exhibit 1 was to advise all Parklane stockholders whether to
7 decide to accept \$2 per share or to seek appraisal rights?

8 MR. PARKER: Objection. The document speaks
9 for itself. I don't think there is need for any further
10 comment.

11 THE COURT: It might be. He is going for a question
12 of intent.

13 Go ahead and answer it.

14 MR. PARKER: I object to the form of the
15 question, your Honor.

16 THE COURT: I will permit it.

17 MR. GARMANSKY: Would you please read the
18 question back?

19 (Read.)

20 A Yes, sir.

21 Q Mr. Somekh, was there a shareholders meeting for
22 Parklane held on October 14, 1974?

23 A Yes, sir.

24 Q Isn't it a fact that on or about October 14,
25 1974, pursuant to that shareholder meeting, Parklane became

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a private company?

A Yes.

Q Mr. Somekh, are there any statements in Plaintiff's Exhibit 1 that you know to be inaccurate or incorrect?

MR. PARKER: Objection as to form?

THE COURT: I will let him answer it.

MR. PARKER: May I comment, your Honor?

THE COURT: Sure.

MR. PARKER: It seems to me the question is a blunderbuss kind of question which can't be deemed to be fair to this witness. He has asked him about a multi page document and on that basis he is asking him whether he knows of anything that is inaccurate or whatever word of it that is used --

THE COURT: Inaccurate or incorrect?

MR. PARKER: It seems to me to be the type of a blunderbuss question which is totally unfair to this witness. If there is something the interrogator wants to elicit, he can do so.

The fact also, your Honor, this case is a limited case in terms of the document which has been admitted. There is just a very, very few areas that the government is complaining about and they have specified what they are.

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2 THE COURT: He might come up with something else.

3 MR. PARKER: If that be so, may I respectfully
4 suggest that that would be a sufficient reason to require
5 Mr. Garmansky to pursue it in a proper specific fashion,
6 what it is he wants to pursue.

7 THE COURT: Look, this witness might tell me that
8 the entire thing is a phony. How do I know?

9 Answer the question.

10 A No, sir.

11 Q Prior to October 14, 1974, Mr. Somekh, did you have
12 any meetings with anyone to discuss Parklane returning to the
13 status of a private company?

14 THE COURT: The answer to that is either yes
15 or no.

16 A Yes, sir.

17 Q When for the first time, Mr. Somekh?

18 MR. PARKER: If your Honor please --

19 THE COURT: I am fearful we are going to wander
20 into a whole area of possible attorney-client privilege.

21 MR. PARKER: May I add to that with the greatest
22 respect, I think is more than that. I think what we have
23 here and we are judging this by the complaint that
24 has been served, a very limited kind of a case. The
25 question smacks of a going private question and the fact

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Somekh-direct

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2 of the matter is, the complaint indicates that this is not a
3 going private case. What this case involves as the
4 complaint shows --

5 THE COURT: Counselor, don't sum up.

6 MR. PARKER: Yes, your Honor.

7 It seems to me the case is quite limited as
8 the pleading shows --

9 THE COURT: I asked you once.

10 Q Mr. Somekh, when for the first time did you have
11 discussions concerning going private?

12 A Probably some time in June or July, 1974.

13 Q Isn't it a fact, Mr. Somekh, that you met
14 with representatives of Thompson McKinnon in March of '74 to
15 discuss Parklane becoming a private company?

16 MR. PARKER: Objection.

17 A Absolutely not.

18 THE COURT: He said no.

19 MR. PARKER: My objection is noted.

20 Q Who was present, Mr. Somekh, at the meeting in
21 June or July 1974 to discuss Parklane returning
22 to the status of a private company?

23 A Nobody.

24 Q Nobody was present?

25 A No, sir. I had discussed it with one of the --

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one or two attorneys at Kaye, Scholer who were to advise me on
this matter.

MR. GARMANSKY: Your Honor, I am confused. I don't
understand the witness' answer. He answered there was a
meeting.

THE COURT: Was there a meeting with one or two
attorneys from Kaye, Scholer?

THE WITNESS: There was some time in July.

THE COURT: Did you have a phone conversation in
June? Is that what you meant when you said nobody was
present?

THE WITNESS: I may have inquired from one of the
attorneys at Kaye, Scholer some advice, something regarding
this kind of an action.

THE COURT: Okay.

MR. GARMANSKY: May I take out a moment to have
the witness' response read back?

THE COURT: Sure.

(Read.)

Q So you recall your first meeting to discuss
going private, was to be with Kaye, Scholer, is that cor-
rect?

MR. PARKER: I object on the ground of its
irrelevancy and immateriality to the issues involved here.

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2 MR GARMANSKY: The witness opened up the door.

3 THE COURT: The witness said he had his first
4 meeting in June or July with attorneys from Kaye, Scholer.
5 I don't know what the repetition is required for at all.

6 I will sustain it as asked and answered.

7 Q Mr. Somekh, do you recall testifying before the
8 Securities and Exchange Commission?

9 A Yes, sir.

10 Q Do you recall testifying on or about February 13,
11 1975 before the Commission?

12 A If that is the date and you are sure of the
13 date, that was the day I was there.

14 MR. GARMANSKY: I would like to mark a
15 Securities Exchange Commission official transcript proceed-
16 ing of Parklane Hosiery Company, Inc. dated February 13, 1975
17 as Plaintiff's Exhibit 2.

18 (Plaintiff's Exhibit 2 was marked for
19 identification.)

20 Q Mr. Somekh at the time you testified, were you
21 placed under oath?

22 A Yes, sir.

23 Q Mr. Somekh, please turn to page 94 of that
24 transcript, Plaintiff's Exhibit 2, line 5.

25 A Yes, sir.

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Somekh-direct

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2 Q "Q Mr. Somekh" --

3 THE COURT: Just a minute. Let counsel get it.

4 Q Starting on line 5.

5 "Q Mr. Somekh, when do you recall the first time
6 talking to anyone about whether or not Parklane should
7 become a privately held company?

8 "A Either the end of June or early July.

9 "Q What year ?

10 "A 1974.

11 "Q Who did you talk with?

12 "A To counsel, Mr. Saul Silverman.

13 "Q What firm is Mr. Silverman with?

14 "A He is the managing partner of Clarence,
15 Raines. However, he is an attorney."

16 Were you asked those questions and did you give
17 those answers?

18 A Yes, sir.

19 Q If you were asked those same questions today,
20 would your answer be the same?

21 A I think there is a difference in the terms of
22 question. If you are talking about attorneys that represent
23 me, they are Kaye, Scholer and my first conversations with Kaye,
24 Scholer were in June or July. I did talk to Mr. Saul Silver-
25 man at the locker room of the club where the conversation

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2 first came up; so if you are talking about talking to
3 attorneys who act on my behalf, it was Kaye, Scholer and
4 I had discussed it subsequent to my conversation with
5 Mr. Saul Silverman.

6 The first time the issue came up was with Mr.
7 Saul Silverman at the locker room of the club.

8 Q Mr. Somekh, the question did not specifically
9 go to attorneys. It just said who did you talk to.

10 Let me ask the question again.

11 Who was the first person you talked to about
12 returning Parklane to the status of a private company?

13 A In general conversations, Mr. Garmansky.

14 Q That is not what the question asked.

15 Please answer the question.

16 THE COURT: Start off in general.

17 A I may have talked to my wife.

18 Q Do you recall doing so?

19 A I probably may have. I can't remember specific
20 conversations. I may have talked to Mr. Milner at the of-
21 fice, because there were some article about this subject
22 appearing in the papers at that time in May or June or July
23 and I may have mentioned it.

24 Q Mr. Somekh, are you changing your answer on
25 page 94?

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Somekh-direct

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2 A No, sir.

3 Q Then who did you talk to the first time,
4 Mr. Somekh?

5 A I can't tell you, sir. If I could, I would.

6 Q What did you say to Mr. Silverman and what did Mr.
7 Silverman say to you?

8 MR. PARKER: Objection. Mr. Somekh indicated Mr.
9 Silverman was acting in the capacity of counsel --

10 THE COURT: I was here. Did you listen?

11 MR. PARKER: Yes.

12 THE COURT: He said he talked to him in the locker
13 room of the club but he did not talk to his attorney until
14 he talked to Kaye, Scholer. I assume the two fellows came
15 in from playing golf. If you make that into an attorney-client
16 privilege, you are reaching and then some.

17 MR. PARKER: I don't intend to reach. The
18 fact of the matter is and what Mr. Garmansky has not brought
19 out, there was a long standing relationship between Mr.
20 Silverman and Mr. Somekh and his company and what he
21 testified to and in the testimony that Mr. Garmansky read
22 from the transcript of his investigation, he said:

23 "Q Who did you talk with?

24 "A To counsel, Mr. Sol Silverman."

25 That is what the record shows, your Honor,

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Somekh-direct

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2 and the fact of the matter --

3 THE COURT: Are you saying something was left
4 out in the first reading?

5 MR. PARKER: That was in the reading.

6 MR. GARMANSKY: It also goes on what firm
7 Mr. Silverman is with and he is with Clarence, Rainess which
8 is an accounting firm.

9 MR. PARKER: There is nothing inconsistent
10 with the fact that Mr. Sol Silverman happened to have been a
11 lawyer and was talking to Mr. Somekh in that capacity and
12 we assert the attorney-client privilege.

13 THE COURT: I will sustain it.

14 MR. GARMANSKY: May I inquire of the witness
15 to see if there is a valid privilege?

16 THE COURT: Sure.

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Q Mr. Somekh, in what capacity did you retain Clarence, Rainess, as an accounting firm or as a legal firm?

A I don't think the assignment was very specific, Mr. Garmansky.

Q What type of work does Clarence, Rainess perform, Mr. Somekh?

A They perform accounting work and they perform some tax advising, they perform all kinds of functions, really, as the functions are needed or called for.

Q And does Parklane have legal counsel?

A Yes, sir.

Q Who is that?

A Kaye, Scholer.

Q How long has Parklane had Kaye, Scholer?

A For ten years.

Q How long has Parklane retained Clarence, Rainess as an accounting firm?

THE COURT: No, wait a second.

MR. GARMANSKY: Withdrawn.

Q How long has Parklane retained Clarence, Rainess?

A I think about 14 years, sir.

MR. GARMANSKY: Your Honor, I don't believe that Mr. Sol Silverman acted in the capacity as a lawyer. He

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Somekh - direct

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works for an accounting firm, so there is no different changes. They have Kaye, Scholer whom they have used as counsel.

THE COURT: Yes, and they also have Jacobs, Persinger & Parker as counsel. The use of Kaye, Scholer does not exclude seeking legal advice from others. Once I heard that tax advice was being given also by Rainess & Company, that fits in under the genre of legal advice. If it has been going on for 14 years, they might have a valid attorney-client privilege. Nothing I have heard will dissuade me at this point from that.

Q After your conversation with Mr. Silverman, Mr. Somekh, did you have any other meetings to discuss Parklane being a private company?

A I had some meetings with Mr. Jack Friedman of Kaye, Scholer.

Q Is that the only person you had meetings with?

A Other members of the firm may have drifted in and out of the room.

Q Is this the Kaye, Scholer firm?

A Yes, sir.

Q Any other individuals present?

A I am not sure, sir.

Q How about Mr. Nathan Lubow, was he present?

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Somekh - direct

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A At some of the meetings.

Q Who was Mr. Lubow?

A Mr. Lubow is the partner who is in charge of our account at Clarence, Rainess.

Q He is an accountant, is that correct?

A Yes, sir.

Q Is he a lawyer?

A No, sir. At least I don't know.

Q How many meetings did you have in which Mr. Lubow was present?

A At Kaye, Scholer?

Q Anywhere.

A Maybe one.

Q One meeting?

A Or two at the most.

Q What was discussed at the meetings at which Mr. Lubow was present?

A It was for him to supply Kaye, Scholer with the accounting part of what has to be done in the going private transaction.

MR. GARMANSKY: Your Honor, I'd like the witness' response stricken from the record. I asked what was discussed at these meetings. He gave me the purpose.

THE COURT: He answered.

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MR. GARMANSKY: He gave me the purpose why Mr. Lubow was there. I asked what was discussed.

THE COURT: If that's what you asked, that's what you got.

Q Was there anything else discussed at the meetings, Mr. Somekh?

MR. PARKER: I think at this point, your Honor, I would be inclined to and I do enter an objection, again on the ground of attorney-client privilege. I don't think Mr. Garmansky has indicated that the services that may have been rendered by participation by Mr. Lubow in any way departed from the legal function. It seems to me so far on the basis of this record that whatever Mr. Lubow may have done, because the record doesn't speak otherwise, was related to the legal function and as such would come within the same attorney-client privilege.

MR. GARMANSKY: Your Honor, Mr. Somekh has just stated that --

THE COURT: That his accountant was there. You asked what the discussion was with his accountant. He said things necessary to go private. Perfectly valid answer. There is a way to do it, Mr. Garmansky. I am not going to do it for you. I am going to take 10 minutes to find out where my other case is. As to you, Mr.

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Somekh - direct

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Parker, I think you ought to have another little chat with
your client and this time you ought to stand behind him.
Take ten.

(Recess.)

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THE COURT: Gentlemen, you heard before that I received a note from the jury. It looks like we are going to have quite a bit of rereading to do to the jury. You might as well go out and have lunch right now. Be back at 2:00. I want to have lunch too.

(Luncheon recess.)

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AFTERNOON SESSION2:20 p.m.

MR. GARMANSKY: With the court's permission, we would like to call another witness and take Mr. Somekh off the witness stand. We are doing this, your Honor, because the witness we are about to call cannot be present tomorrow until possibly in the afternoon. This witness has been here since before lunch.

THE COURT: Mr. Parker, do you object?

MR. PARKER: I had not known there was a plan to call Mr. Baggott today. It may be if he is put on the stand at this time, your Honor, I may have to recall him anyway.

THE COURT: Let's see.

Step down, Mr. Somekh.

MR. PARKER: In the terms of the court, to the extent there is an objection, I make one.

THE COURT: Call him.

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T H O M A S E. B A G G O T T, called as a witness on behalf of the plaintiff being first duly sworn, testified as follows:

THE COURT: By whom are you employed?

THE WITNESS: Bankers Trust Company. I am vice president in charge of the Seventh Avenue office.

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Baggott - direct

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2 THE COURT: How long have you had that position?

3 THE WITNESS: Since I have been with the bank
4 fourteen and a half years.

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5 DIRECT EXAMINATION

6 BY MS. LIEBHARDT:

7 Q What are your responsibilities as vice president
8 in charge of the 39th Street branch?

9 A It has to do with the administering of all
10 activities in the branch, export and personal loans and
11 administration of running the bank as an enterprise.

12 Q How many loan accounts do you supervise?

13 A Approximately 800.

14 Q Are you familiar with a company called Parklane
15 Hosiery Company?

16 A Yes.

17 Q I will refer to it hereafter as Parklane.

18 Are you familiar with an individual by the name
19 of Herbert Somekh?

20 A Yes.

21 Q Tell the court the circumstances under which you
22 became familiar with Parklane and Mr. Somekh.

23 A The business of Parklane Hosiery was introduced
24 to us for credit consideration in the middle of '71 and
25 we were asked to consider a loan to the company as well as

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1 additionally a loan to Mr. and Mrs. Somekh personally,
2 secured, and after investigation we decided to go and we did.

3 Q How much did you make the loan for for Parklane?

4 A A loan of \$750,000 was made to Parklane Hosiery.

5 Q What was the sum of money for the loan, the per-
6 soral loan for Mr. and Mrs. Somekh?

7 A It was 900,000.

8 Q Since the making of these loans in 1971, has
9 anybody supervised the Parklane account and the personal
10 account of the Somekhs?

11 A Yes.

12 Q Who would that be?

13 A That would be me.

14 Q What work do you perform in connection with
15 supervising these accounts?

16 A Well, monitoring the agreement as far as the
17 export loan is concerned and the same as far as the per-
18 sonal loan, to the end that repayment would be made as
19 agreed.

20 Q Do you have any conversations with anybody at
21 Parklane?

22 A Yes, quite often in connection with both
23 obligations.

24 Q Can you estimate how many conversations you have?

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A I would say over the period of years involved, there were many conversations. Over the telephone, at lunch, what have you.

Q Who were these conversations with, Mr. Baggott?

A Principally with Mr. Somekh. Sometimes in the accompaniment of his accountant.

Q Who would that be?

A Mr. Lubow, sometimes Mr. Hut.

Q Who is Mr. Hut?

A Mr. Hut and Mr. Lubow are partners in the accounting firm of Clarence, Rainess & Company.

Q In 1971 when Bankers Trust approved the \$900,000 loan to the Somekhs, was any collateral put up for that loan?

A Yes. There was a substantial package of collateral put up.

Q Would you please describe that package of collateral?

A The collateral consisted of, firstly, the stock in Parklane Hosiery held by Mr. and Mrs. Somekh which at that time was a listed company. It consisted also of other equities of a negotiable nature. It consisted of assignment or mortgaging of other real estate properties. I have reference to two major pieces, the

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Baggott - direct

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Tulsa property and the Pensauken property, and there

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was a variety of other securities assigned to us as

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security for the package.

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THE COURT: Was a mortgage given on the property?

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THE WITNESS: On the Pensauken property.

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THE COURT: But not on the Tulsa property?

8

THE WITNESS: No.

9

Q Mr. Baggott, since 1971 when the loan was first

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commenced and up through August of 1974, did Mr. Somekh

11

repay any portion of his personal loan?

12

A Yes. He made one payment on the personal loan

13

in I believe late '71 or early '72. That was an amount

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of \$80,000.

15

Q Any other payments?

16

A No.

17

Q Subsequent to this \$80,000 payment, have you had

18

any conversations or meetings relating to Mr. Somekh's

19

personal loan with Mr. Somekh?

20

A Yes, quite a few.

21

Q Do you recall how many times you discussed this

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with Mr. Somekh in the same period of time, 1972 through

23

1974, August of 1974?

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A I couldn't mention the exact number, but there

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were innumerable discussions with him on the personal loan.

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Baggott - direct

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Q What form did these discussions take?

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MR. PARKER: Objection as to form.

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THE COURT: I will permit it.

5

A The conversations would take the form of telephone conversations. They would be conversations over lunch or dinner or written communication.

6

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Q Mr. Baggott, do you recall who was present at these discussions?

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A Well, yes. I would say mostly Mr. Somekh and I were involved quite often individually. Sometimes the accountants or one or two of them would be present and quite often one of my associates at the bank.

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Q Can you name those associates?

15

A Mr. Steven Fried was the associate I had that was mostly interested.

16

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Q Was there a general theme to these meetings and conversations?

18

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MR. PARKER: Objection as to form.

20

THE COURT: Yes.

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MS. LIEBHARDT: I withdraw the question.

22

Q What was discussed at these meetings?

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MR. PARKER: I object to the form of that question.

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THE COURT: Who said what to whom?

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2 Q Mr. Baggott, what did you say to Mr. Somekh
3 or what did Mr. Somekh say to you?

4 MR. PARKER: There is no identification here of
5 any meeting.

6 THE COURT: We will get to it.

7 Go ahead.

8 A Would you rephrase the question?

9 THE COURT: What did you say to Mr. Somekh and
10 what did he say to you?

11 MR. PARKER: Objection.

12 THE COURT: Overruled.

13 A The conversations centered primarily on the re-
14 payment of the personal loan.

15 THE COURT: Can you identify any one conversa-
16 tion that took place, approximately?

17 THE WITNESS: I would say to identify one, I
18 would say in the latter part of '73 there were several,
19 in early '74, through most of '74 there were quite a few.
20 I can identify January '74, roughly.

21 THE COURT: Okay, January '74. Let's take that
22 first.

23 Where did the conversation occur?

24 THE WITNESS: It occurred at a luncheon.

25 THE COURT: Do you recall where?

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THE WITNESS: I recall it was the Weaver's Club.

THE COURT: Tell us what the conversation was, what did you say to him, what did he say to you?

THE WITNESS: Well, I said to him the original agreement with respect to the repayment of the personal loan had by then gone past the agreed two years and we had only had one payment and we would certainly like to get the balance repaid as soon as possible.

THE COURT: What did he say?

THE WITNESS: He said he was making every possible effort to do so and we told him --

THE COURT: Who is "we"?

THE WITNESS: The bank, I. I told him I would like to go beyond whatever efforts he had already made to that point, to repay the personal loan.

THE COURT: Was there anything else said about this?

THE WITNESS: He promised to expedite wherever possible. He had a certain agreement going at the time, I believe, on the Tulsa property with Lehman Company and there had been a stretchout in time and the deal he had with them which I was not privy to, did not apparently come to fruition and that was explained to us.

He narrowed down the possibilities of additional

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payment by the possible consideration of selling of additional instruments we had. He suggested the possibility of mortgaging his home, selling of the Rite-Aid note he held.

THE COURT: What is a Rite-Aid note?

THE WITNESS: The Rite-Aid happens to be the name of a company, a large chain of drug stores which he held from them a note, a mortgage note, I believe, in connection with the sale of property he had made to them sometime before that. It was good property in that Rite-Aid was a very substantial organization.

THE COURT: Go ahead.

(Continued on next page.)

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Baggott - direct

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MS. LIEBHARDT: I'd like to have these marked
as Plaintiff's Exhibits 3 and 4 for identification.

(Plaintiff's Exhibits 3 and 4 were marked for
identification.)

BY MS. LIEBHARDT:

Q Do you recognize the documents that have just
been marked for identification?

A Yes.

Q Would you tell me what they are?

THE COURT: Start with 3.

A 3 is a letter from me to Mr. Somekh dated Janu-
ary 25th pertaining to --

MR. PARKER: Objection, your Honor.

THE COURT: It is a letter to Mr. Somekh pertain-
ing to something. Just give us in general outline form what
it contains.

MR. PARKER: That is the basis of my objection,
the fact that he is going to be testifying about a docu-
ment that is in writing and not in evidence.

THE COURT: Do you want to offer it?

MS. LIEBHARDT: Yes, I do.

THE COURT: Do you object?

MR. PARKER: Yes, I do object, and I am prepared
to state the ground of my objection as well.

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Baggott - direct

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2 THE COURT: Tell me what your ground is.

3 MR. PARKER: If your Honor pleases, I object to
4 the relevance of the document now being offered and the
5 other document which has now been marked for identifica-
6 tion as Plaintiff's Exhibit 4. It goes to a question
7 which we respectfully submit is not in issue here. It is
8 unrelated to the issues framed by the plaintiff. It is
9 immaterial to the issue framed by the plaintiff. The issue
10 before your Honor, it seems to me, is whether there were
11 any misstatements made or failures to make statements
12 which should have been made in a proxy statement, and this
13 does not approach, if I may suggest, your Honor, the issue
14 which that proxy statement presents, and the issue which
15 the plaintiff has brought before the court.

16 THE COURT: All right, I understand. Give me
17 3, will you, please?

18 (Pause.)

19 THE COURT: Received. Objection overruled.

20 (Plaintiff's Exhibit 3 was received in evidence.)

21 BY MS. LIEBHARDT:

22 Q What is Plaintiff's Exhibit 4, Mr. Baggott?

23 A 4 is a letter by me to Mr. Somekh dated Febru-
24 ary 25, 1974, requesting additional information on the
25 Riverbend property and the relationship of Lehman Company

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Baggott - direct

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to it, and asking for additional application of liquidation of other securities that we held on the personal loan towards redemption -- repayment of the personal loan.

Q What were the circumstances surrounding your writing of this letter?

MR. PARKER: If your Honor please, I object on the same ground as previously stated.

THE COURT: That's your only objection?

MR. PARKER: I think I object as well in that she's inquiring about a document not in evidence.

THE COURT: Your only objection was the same one you had before?

MR. PARKER: It is irrelevant, immaterial.

THE COURT: Yes, I heard the first time.

(Pause.)

THE COURT: Mark it in evidence.

(Plaintiff's Exhibit 4 was received in evidence.

BY MS. LIEBHARDT:

Q Mr. Baggott, do you recall a meeting with Mr. Somekh in or about March of 1974?

A Yes, I believe I do, yes.

Q Do you recall where the meeting was?

A Yes, it was a luncheon.

THE COURT: Where was it?

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1 THE WITNESS: At the Weavers Club.

2 Q Do you recall who was present at the meeting?

3 A I believe Mr. Somekh, Mr. Lubow and my associate,
4 Mr. Fried.

5 Q What was discussed at this meeting?

6 A Again, a request for repayment of the loan --

7 THE COURT: Who made the request?

8 THE WITNESS: I did.

9 MS. LIEBHARDT: I'd like to have this document
10 marked as Plaintiff's Exhibit 5 for identification.

11 THE COURT: Do you mean to say there was no re-
12 sponse to that request?

13 THE WITNESS: I didn't say that, no.

14 THE COURT: Tell us what the response was.

15 THE WITNESS: The response was that they were
16 making every effort to do so, and we would -- he would
17 soon have an area developed on the Rite-Aid mortgage and
18 the home mortgage which would be a first step towards
19 reducing the loan.

20 (Plaintiff's Exhibit 5 was marked for identifi-
21 cation.)

22 THE WITNESS: I recall some of the --

23 THE COURT: You recall something else, do you,
24 about this meeting?
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1 THE WITNESS: I'd like to refresh myself on it.
2
3 This was the March meeting referred to?

4 Q Yes, it was.

5 A We stressed the urgency -- not the urgency --

6 THE COURT: Who is "we"?

7 THE WITNESS: The bank. I did, and my associate.
8 We requested again repayment or reduction of the loan, and
9 he indicated then, as I said, there are two instruments
10 involved. One was the Rite-Aid and the mortgage situation
11 and then I believe it was at that time -- I'd like to re-
12 fresh myself on that, I am thinking of the timing --

13 THE COURT: Tell us what your best recollection
14 is.

15 THE WITNESS: I am trying to get my timing as
16 to when the principals told us --

17 THE COURT: Who are the principals?

18 THE WITNESS: The principal, Mr. Somekh, and
19 the accountant, Mr. Lubow, told us that they had decided
20 to go private. I don't recall exactly now if it was at
21 that meeting or a later meeting, but if I could --

22 Q Mr. Baggott, have I exhausted your recollection
23 as to what occurred at that March meeting?

24 A Pretty much.

25 Q Let me show you a document that has just been

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Baggott - direct

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marked as Plaintiff's Exhibit 5. Do you recognize the document?

A Yes.

Q Will you tell us what the document is?

A This is a writeup prepared by me for the bank's credit file, I would say immediately after the meeting with Mr. Somekh and the principals of Rainess Company.

Q Do the contents of Plaintiff's Exhibit 5 for identification accurately reflect what occurred at the meeting, Mr. Baggott?

MR. PARKER: I object, your Honor.

THE COURT: Oh, no, I will take it. Do they?

THE WITNESS: Yes.

THE COURT: Okay. After reading it -- have you read it?

THE WITNESS: Yes.

THE COURT: After reading that, do you have any refreshed recollection as to what went on at the meeting?

THE WITNESS: That's just about what I said. We stressed the desire to have the loan paid. They indicated they had --

THE COURT: Don't read from that. Tell me what you remember.

THE WITNESS: They indicated that they had two

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2 possibilities of working out immediately, and that the
3 Lenman-Tulsa deal had not come to fruition, and they
4 wanted to proceed right away with the two instruments in
5 question. One was the Rite-Aid and the other was the
6 mortgage of his home, providing funds to reduce the per-
7 sonal secured loan.

8 Q Is it in the regularly conducted business
9 activity of Bankers Trust to prepare and preserve such
10 memoranda as Plaintiff's Exhibit 5 for identification?

11 A Yes.

12 Q I direct your attention to the bottom of the
13 exhibit. There are a series of initials across the width
14 of the page.

15 What do those initials mean?

16 A They would be the initials of the officers who
17 were with me at the branch and indicating that they had
18 read the memorandum, and then below that would be the
19 names of other people in the bank who a copy of the memoran-
20 dum went to.

21 MS. LIEBHARDT: Your Honor, plaintiff offers
22 into evidence Plaintiff's Exhibit 5 for identification.

23 MR. PARKER: Objection, your Honor, on the same
24 ground as previously --

25 THE COURT: The same grounds?

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Baggott - direct

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2 MR. PARKER: And also the fact that it is not
3 binding on us, your Honor.

4 THE COURT: Why don't you just make it general.
5 I will sustain it that way.

6 MS. LIEBHARDT: This document, your Honor, was
7 prepared in the regular course of business of Bankers
8 Trust.

9 THE COURT: Sure. So were accident files and
10 they don't come in either.

11 MS. LIEBHARDT: Mark these documents, please,
12 Plaintiff's Exhibits 6 and 7.

13 MR. GARMANSKY: Your Honor, under Rule 803 of
14 the federal rules of evidence, under the exception to
15 hearsay rules, point 6, records of regularly conducted
16 activity. I believe the witness testified that this is
17 a regularly conducted activity of Bankers Trust, to make
18 memoranda of this type to keep in the files. That would
19 come under the exception --

20 THE COURT: Give me the thing. Let me read it.
21 If it is what I think it is, it is not coming in.

22 (Pause.)

23 THE COURT: No.

24 MR. GARMANSKY: There is a second ground why this
25 document should come into evidence. This document acts as

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Baggott - direct

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2 independent corroboration of the witness. We expect
3 witnesses later in our case to deny some of the events
4 of these meetings or to deny what went on at these
5 meetings. As an independent corroboration, your Honor,
6 I believe the document should come in.

7 THE COURT: No.

8 (Plaintiff's Exhibits 6 and 7 were marked for
9 identification.

10 BY MS. LIEBHARDT:

11 Q Mr. Baggott, would you take a look at what has
12 been marked Plaintiff's Exhibits 6 and 7. Tell me if you
13 recognize them.

14 A Yes. These would be copies of letters sent to
15 me by Mr. Somekh pertaining to an understanding and agree-
16 ment by him to execute the agreement we arrived at of sell-
17 ing the Rite-Aid note and attempting to obtain a mortgage
18 on his personal residence to get funds to reduce the per-
19 sonal loan. That's the one of March 12th.

20 On the second one, March 15th, another letter
21 from Mr. Somekh to me, updating me on what progress he had
22 made in that connection.

23 MR. PARKER: If your Honor please, I respect-
24 fully move to strike the witness' testimony as irrelevant
25 and immaterial to the issue here.

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Baggott - direct

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2 THE COURT: You have to be kidding. No. All
3 right. Show the exhibits to your opponent.

4 (Pause.)

5 THE COURT: Do you object?

6 MR. PARKER: On the same grounds as previously
7 stated, your Honor. On the ground that these documents
8 are irrelevant and immaterial to the issues before the
9 court.

10 MS. LIEBHARDT: Your Honor, the plaintiff feels
11 that these letters --

12 THE COURT: Let me ask you a question. You
13 claim that this is a straight-out 10(b)5 question. Mr.
14 Somekh is a defendant in a straight-out 10(b)5 action.
15 That's a fraud action. There is some question as to
16 whether intent and motive should be considered in fraud
17 actions. Generally they are. The Commission contends
18 that these show the intent and the motive for the fraud.
19 How in blazes can that be irrelevant or immaterial?

20 MR. PARKER: If your Honor pleases, may I respond?

21 THE COURT: Sure. That's what I am asking you
22 for.

23 MR. PARKER: If your Honor pleases, there be
24 10(b)5 questions and 10(b)5 questions. They vary, they
25 differ from case to case. We have addressed ourselves to

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Baggott - direct

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what the Commission here is contending constitutes actionable conduct. They have defined what they consider constitutes actionable conduct. I might say, your Honor, that we are not here considering the question of whether the act of going private is a fraudulent act. That question is behind us. That question never arose in this case, and I am concerned, your Honor, I am very concerned that this court may be under the impression that the question presented here is whether it is lawful for a company at some point after it had achieved public status to return to private status. If your Honor pleases --

THE COURT: Look, I will take the problems up one at a time. You still haven't answered my question.

MR. PARKER: I am trying to get to it, if I may, your Honor. I suggest to your Honor that what the Commission has done here, and for the reasons that they may or may not have explained, it has ruled out of here a question whether going private constitutes actionable conduct. Instead --

THE COURT: How about the question of going private and doing it fraudulently, is that question alive here?

MR. PARKER: May I restate the question?

THE COURT: No, no, answer my question. Is that a question here?

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2 MR. PARKER: No, sir.

3 THE COURT: It is not? In other words, filing
4 false statements with the SEC in connection with proxy
5 statements is not in any way a question in this case?

6 MR. PARKER: No, I can't say that. I think that's
7 a different question your Honor puts to me.

8 THE COURT: It is the same question. It is just
9 turned around a little bit to make sure you recognize it.

10 MR. PARKER: Tdrned around enough to make it sub-
11 stantially different, if your Honor please, and that is
12 exemplified by the nature of the pleading the SEC has
13 filed here. They have chosen the grounds on which they
14 wish to challenge this proxy statement, and the grounds
15 on which they chose to challenge this proxy statement is
16 whether there had been proper disclosure made in that proxy
17 statement. If there is to be articulated here a question
18 of fraud, it is a question whether there was a fraud com-
19 mitted when that proxy statement was issued.

20 THE COURT: Look, I think you will agree with me,
21 if there is an innocent misstatement, we don't arrive at a
22 question of fraud. But if the misstatement is not inno-
23 cent, then that's a different beast. What they are trying
24 to show at this point is why the misstatement was not
25 innocent and why there was a motive for the misstatement.

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2 MR. PARKER: If your Honor pleases, I think that
3 there may be, and I say this with the greatest respect,
4 an assumption in your Honor's statement which is not
5 really justified by the record. There is an assumption
6 there that there was a misstatement. There has been no
7 showing here that there was a misstatement.

8 THE COURT: We are not up to that point yet.

9 MR. PARKER: It seems to me that in the proper
10 order of proof, the plaintiff here ought to be required
11 first to establish that there was a misstatement, not do
12 this by the back door and try to impose here prejudice,
13 inflammatory statements, inflammatory thoughts, when its
14 complaint is a complaint to which it hasn't yet addressed
15 itself in terms of the proof. There is in this proxy
16 statement the very thing which constitutes the disclosure
17 which they are attempting to challenge, and they will not
18 confront that disclosure, because --

19 THE COURT: Counselor, look. You try your case,
20 let them try theirs.

21 MR. PARKER: If your Honor pleases, in this re-
22 spect I respectfully submit to you that in trying their
23 case they are avoiding the issue which they themselves have
24 presented.

25 THE COURT: At the end of their case, if you

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Baggott - direct

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think they have avoided the issue, you make a motion to
dismiss. Beautiful.

MR. PARKER: If your Honor pleases, I moved to
dismiss. I moved to dismiss on the grounds that there are
only questions of law here to be decided.

THE COURT: I read your cases and I read your
papers, and there is certainly a question of fact here.
At least up to now there is.

All right, mark it in evidence.

XXX

(Plaintiff's Exhibits 6 and 7 were received in
evidence.)

XXX

(Plaintiff's Exhibit 8 was marked for identifi-
cation.)

BY MS. LIEBHARDT:

Q Do you recognize Plaintiff's Exhibit 8 for
identification?

A Yes. This was a letter --

MR. PARKER: I object, your Honor, for the wit-
ness explaining what this letter is.

Q Did you write this letter, Mr. Baggott?

A Yes, I did.

THE COURT: On what date did you write it?

THE WITNESS: March 18, 1974.

THE COURT: To whom was it addressed?

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1 THE WITNESS: Mr. Herbert Somekh.

2 THE COURT: Did you mail it --

3 THE WITNESS: Yes.

4 THE COURT: -- or cause it to be mailed?

5 THE WITNESS: Yes.

6 MS. LIEBHARDT: Your Honor, plaintiff offers
7 Exhibit 8 in to evidence as well.

8 MR. PARKER: Objection on the same grounds as
9 previously stated, your Honor, and I am prepared to re-
10 state the grounds.

11 THE COURT: Sure. Go ahead. Restate it.

12 MR. PARKER: It is irrelevant and immaterial to
13 the issues before the court. I can expand further on --

14 THE COURT: No, no, you have expanded "further"
15 enough.

16 MR. PARKER: Thank you, your Honor.

17 THE COURT: Objection overruled. Mark it in
18 evidence.

19 (Plaintiff's Exhibit 8 was received in evidence.)

20 Q Mr. Baggott, what was the purpose of your writing
21 Plaintiff's Exhibit 8?

22 MR. PARKER: Objection.

23 THE COURT: Sustained.

24 Q At the time that you wrote Plaintiff's Exhibit 8,

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March 8, 1974, had Bankers Trust received any moneys from
Mr. Somekh on the Riverbend transaction?

A No.

(Continued on next page.)

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Baggott - direct

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Q

Did Mr. Somekh give you any reason why Bankers Trust had not gotten any money from the Lehman transaction?

MR. PARKER: It is with the greatest respect

and greatest reluctance I renew my objection on the same ground.

THE COURT: Same ruling.

A

Yes, he explained to me why we had not received any money on the Riverbend-Lehman situation as I explained previously. There had been some, I would say, falling out of the arrangement he had with Lehman --

THE COURT: Who said?

THE WITNESS: Mr. Somekh.

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(Continuing) He said the reason we have not received any money in connection with the Lehman-Riverbend settlement was that the deal between Riverbend and Lehman had not come to fruit and no monies were available and for a variety of legal reasons, which I did not get into, that was the reason we did not get any money from him on that part of the securities held by us.

MS. LIEBHARDT: I would like these letters marked as Plaintiff's Exhibits 9 and 10.

(Plaintiff's Exhibits 9 and 10 marked for Identification.)

Q

Mr. Baggott, do you recognize the letters marked

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Plaintiff's Exhibits 9 and 10?

A Yes, I do. Exhibit 9 was a letter addressed to me by Mr. Somekh on March 27, 1974. He brings me up-to-date-

MR. PARKER: I object to this witness testifying about the contents of that letter.

THE COURT: All right. It is a letter you received from Mr. Somekh?

THE WITNESS: Right.

THE COURT: What is the date on it?

THE WITNESS: March 27, 1974.

THE COURT: Do you offer the letter?

MS. LIEBHARDT: Yes, I do, your Honor.

MR. PARKER: I have seen it, your Honor, and with the greatest respect, I object to the offer on the same grounds previously stated.

THE COURT: Same ruling.

(Plaintiff's Exhibits 9 and 10 received in Evidence.)

MS. LIEBHARDT: Would you mark this.

(Plaintiff's Exhibit 11 marked for Identification)

Q Do you recognize Plaintiff's Exhibit 11, yes or no?

A Yes, I do recognize it.

Q Did you write Plaintiff's Exhibit 11?

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A Yes.

Q Who did you write it to?

A To Mr. Herbert Somekh, June 7, 1974.

MS. LIEBHARDT: I offer Plaintiff's Exhibit 11 into evidence.

THE COURT: Did you mail it or cause it to be mailed?

THE WITNESS: Yes, I did mail it.

MS. LIEBHARDT: I offer it into evidence as Plaintiff's Exhibit 11.

MR. PARKER: Objection on the same grounds as previously stated. I am prepared to restate the grounds.

THE COURT: No need. Same ruling.

xx (Plaintiff's Exhibit 11 received into Evidence.)

Q Mr. Baggott, with regards to Plaintiff's Exhibit 11 in Evidence, did you have any reason for writing that letter?

MR. PARKER: Objection.

THE COURT: Sustained.

What is the date on the letter?

THE WITNESS: June 7, 1974.

THE COURT: As of June 7, 1974, was there any further repayment on the personal loan?

THE WITNESS: No.

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Q Mr. Baggott, you testified to the fact that Mr. Somekh had planned to sell certain real estate property and mortgages to reduce his personal loan.

Prior to August of 1974, did Mr. Somekh sell off any of this real estate?

A Not that I know of.

Q Did Mr. Somekh give you any reasons for not selling off any of the real estate?

A Yes. A prime reason was that the real estate market at the time was depressed and sales were not easy to make in real estate.

Q Did Mr. Somekh say anything else to you?

A In the area of liquidation of the loan?

Q Yes.

A Well, I mentioned already the two areas he went over, the Rite-Aid mortgage and the mortgage on his home. The failure of the Lehman-Riverbend thing to come about and as far as the liquidation of the various securities we had, that is what he said with respect to that.

Q Mr. Baggott --

MR. PARKER: May I have that read back?

(Testimony read.)

Q Mr. Baggott, do you recall any meetings with Mr. Somekh in or about August of 1974?

1 A Yes, I seem to recall, yes.

2 Q Do you recall where the meetings were?

3 A I believe they were in my office.

4 Q How many meetings were there?

5 A Two.

6 Q Let's take the first meeting. Who was present
7 at this meeting?

8 A Mr. Somekh, myself, my associate, Mr. Fried,
9 and Mr. Lubow, Clarence, Rainess & Company.

10 Q Do you recall what was discussed at this meet-
11 ing and by who?

12 A Well --

13 MR. PARKER: If your Honor pleases, I interpose
14 the same objection as previously stated.

15 THE COURT: Same ruling.

16 Go ahead.

17 A Mr. Somekh told us they had decided to go
18 private as a means of liquidating the personal obligation
19 and they told us roughly of the plan, how it would work and
20 so forth.

21 THE COURT: What exactly did he say?

22 THE WITNESS: He said they had decided to go
23 private and in doing so they would take, buy up the outside
24 stockholdings. They would take and sell some of his personal
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Baggott - direct

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properties to the new private company to be and in that way,
be able to pay us back out of the new company to be, the
balance of the personal secured loan.

MS. LIEBHARDT: I would like to mark these
documents as Plaintiff's Exhibits 12 and 13.

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(Plaintiff's Exhibits 12 and 13 marked for
Identification.)

Q Mr. Baggott, I would like to show you what has
been marked as Plaintiff's Exhibit 12. Do you recognize
the document?

A Yes.

Q Who wrote it?

A I did.

Q Do you recall when you wrote it?

A Yes, August 21, 1974.

Q What was your reason for writing it?

MR. PARKER: Objection.

THE COURT: Sustained.

Q Mr. Baggott, do the contents of Plaintiff's
Exhibit 12 for Identification accurately reflect what
occurred at the meeting that you just testified to?

MR. PARKER: Objection. It is a yes or no
answer.

A Yes.

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2 Q Is it in the regularly conducted business
3 activities of Bankers Trust to prepare such a document
4 as Plaintiff's Exhibit 12?

5 A Yes.

6 Q Is it the regularly conducted business activities
7 of Bankers Trust to preserve memoranda such as Exhibit 12?

8 A Yes.

9 MS. LIEBHARDT: Plaintiff offers Exhibit 12 in
10 evidence.

11 MR. PARKER: Objection.

12 THE COURT: I haven't looked at it, but if this
13 is another accident report, it is not going to come in.

14 Objection sustained.

15 Q Mr. Baggott, I would like to show you what has
16 been marked as Plaintiff's Exhibit 13 for Identification.

17 Do you recognize the document?

18 A Yes, I do.

19 Q Who wrote it?

20 A My associate, Steven Fried.

21 Q Do you know when Mr. Fried wrote the document?

22 A September 5th, 1974.

23 Q Did anyone direct Mr. Fried to write the document?

24 A Yes, I did.

25 Q What are the initials TEB on the bottom of page 2?

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2 A Thomas E. Baggott.

3 Q Do you recall when you put those initials on
4 the document, Mr. Baggott?

5 A Immediately after being prepared.

6 Q Mr. Baggott, is it in the regularly conducted
7 business activities of Bankers Trust to preserve such
8 memoranda as Plaintiff's Exhibit 13?

9 A Yes.

10 MS. LIEBHARDT: Plaintiff offers this exhibit
11 into evidence as well.

12 MR. PARKER: Objection, your Honor.

13 MS. LIEBHARDT: Your Honor, this document was
14 written by Mr. Fried and not by Mr. Baggott and it is the
15 best evidence available for what occurred at the meeting on
16 September 5th.

17 THE COURT: What happened to Mr. Fried?

18 MS. LIEBHARDT: He is unavailable. He is
19 employed in California.

20 THE COURT: Objection sustained.

21 MR. GARMANSKY: Your Honor, again I would move
22 that the document be offered into evidence as corroborative
23 testimony in addition to the exception to the hearsay rule.

24 THE COURT: It is not testimony.

25 MR. GARMANSKY: Corroborative evidence, is an

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exception to the hearsay rule under business records.

THE COURT: No way. Objection will remain sustained.

MR. GARMANSKY: Permission to take exception.

THE COURT: Sure.

Q Mr. Baggott, do you recall what was discussed at the September 5th meeting?

THE COURT: First of all, were you at the September 5th meeting?

THE WITNESS: Yes.

THE COURT: Where was the meeting held?

THE WITNESS: The meeting was held at a luncheon.

THE COURT: Do you remember where the luncheon was? Was it the Weaver's Club again?

THE WITNESS: That is right.

THE COURT: Do you remember what was discussed there?

THE WITNESS: Yes.

THE COURT: Tell us what that was?

THE WITNESS: It referred to the details of going private by Mr. Somekh, Parklane Hosiery. Again he told us this was their decision to go, all things were set and ready to go and he again delineated for us how he would do this, how he would go from public to private and how he

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1 would pay out the personal obligation with that method.

2 Q Did Mr. Somekh explain to you how he would pay
3 out his personal loan at this meeting?

4 A Yes.

5 Q Will you explain how he said?

6 THE COURT: Don't explain how he thought he was
7 going to do it. Tell us what he said.

8 THE WITNESS: I thought I had already, but I will
9 again.

10 THE COURT: Go ahead.

11 A He told us that he would transfer certain of
B2 12 the personal assets held by us as security in the personal
13 loan package -- he would sell those to the new private
14 company in connection with a note given by the private
15 company to him and in connection with that note, the new
16 private company would pay him periodically and he would
17 pay out his personal obligation.

18 Q Mr. Baggott, to the best of your knowledge, was
19 the arrangement Mr. Somekh presented to you on September 5th
20 regarding his personal loan carried out in fact?

21 MR. PARKER: Objection.

22 THE COURT: If he knows.

23 A Yes, I believe it was a fait accompli. It was
24 done. They went private.
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2 THE COURT: Were you paid back, the bank?

3 THE WITNESS: We were paid back ultimately.

4 Q Would you please tell the Court what Mr. Somekh
5 has paid to Bankers Trust, payment-by-payment?

6 A Could I refer to my collateral loan payment
7 record?

8 Q Certainly. Go ahead, Mr. Baggott.

9 A In December of 1974, the obligation was \$900
10 thousand. On December 6th, we received a payment of \$70
11 thousand. On December 31 we received \$150 thousand. Then
12 we received monthly payments of \$25 thousand each up to
13 December at which time the obligation had been reduced down
14 to \$355 thousand.

15 THE COURT: December what?

16 THE WITNESS: December of 1975.

17 A (Continuing) On December 11, 1975, we were
18 supplied federal funds in the amount of \$355 thousand from
19 the Chemical Bank to pay the balance of the loan.

20 Q Mr. Baggott, did Mr. Somekh ever tell you where
21 any of these amounts of money came from?

22 A Yes.

23 Q Would you tell us which amounts, what you know
24 about where the source of the money was?

25 A All of the money came to him from Parklane.

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Baggott - direct

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MR. PARKER: Objection. Move to strike. The question was did Mr. Somekh ever tell him.

THE COURT: I am relatively certain another question was interposed.

What did Mr. Somekh say?

THE WITNESS: He told us the money would come to him from Parklane and with those monies he would operate to reduce the loan, which he did.

Q Mr. Baggott, do you know where the \$150 thousand lump sum payment that you just testified to came from?

A That came from Parklane to Mr. Somekh and he told us that this was some form of anticipated bonus or his annual salary of something. I am not quite clear on that and it came to him in one lump figure, December 31, and he turned that over to reduce the loan also.

Q In your conversations with Mr. Somekh about Parklane going private, Did Mr. Somekh ever give you any reasons for Parklane going private?

MR. PARKER: May I have the question back, please.

(Question read)

THE COURT: The question has been asked and answered. Objection sustained.

Q Do Mr. Somekh or Parkland have accounts at Bankers Trust today?

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Baggott - direct

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A No.

Q In the courst of your business relationship with Mr. Somekh, has Mr. Somekh ever had any discussions with you concerning a Parklane leasehold on Nassau Street?

A Yes.

Q When did you have these conversations with Mr. Somekh?

A The discussions with respect to that went over the whole life of the relationship on Parklane before the relationship was entered into and during the life of the relationship.

Q Do you recall how many conversations this was?

A Enumerable.

Q Would you please describe what these conversations were about, what Mr. Somekh said to you?

MR. PARKER: Objection. I think this question is improper when they simply ask on what basis did he say.

THE COURT: He can tell us what he said.

A He said that he was in negotiations with the Federal Reserve with respect to their buying up his leasehold on the store premises he had at Maiden Lane and this being a Parklane property, whenever and whatever funds would come from that would, of course, go to reduce the Parklane corporate obligation.

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2 Q Did Mr. Somekh ever mention any dollar figures
3 to you in these discussions?

4 A The dollar figures ranged over a very wide area
5 going from a million or more back down to \$3 or \$4 hundred
6 thousand.

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2 Q In your discussions with Mr. Somekh, did Mr.
3 Somekh ever state to you his reasons for telling you about
4 these negotiations?

5 A Yes. It was, as I said, a reason -- the reason
6 would be to get the funds with which to reduce the cor-
7 porate obligation.

8 Q Did Mr. Somekh ever make any statements to you
9 concerning the status of these negotiations?

10 MR. PARKER: I object, your Honor. I think that
11 this is not fixed as to time and is too imprecise to justify
12 a question.

13 THE COURT: We will see. Answer it.

14 Q Mr. Baggott, in these discussions did Mr. Somekh
15 make any statements to you concerning the status of the
16 negotiations?

17 A Yes. Quite a few.

18 Q In 1974 did Mr. Somekh ever discuss with you the
19 status of the negotiations?

20 A Yes. He discussed the status of the negotiations
21 in every year of the relationship.

22 Q In 1974, what did Mr. Somekh say?

23 A There was a dim view at that time as to ultimate
24 realization of the funds, but we discussed it, but he had
25 no clear indication as to when and how much.

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Q Did Mr. Somekh ever tell you that negotiations had ended?

A No.

MS. LIEBHARDT: I'd like to mark this letter as Plaintiff's Exhibit 14 for identification.

(Plaintiff's Exhibit 14 was marked for identification.)

Q Mr. Baggott, would you please take a look at Plaintiff's Exhibit 14 for identification and tell me whether you recognize it.

A Yes, I do.

Q Who wrote the letter?

A It was a letter directed to me by Mr. Somekh.

Q Did you receive that letter?

A Yes, I did.

THE COURT: What's the date of it?

THE WITNESS: October 29, 1974. The content indicated --

THE COURT: No, no.

MS. LIEBHARDT: Plaintiff offers the letter into evidence as Plaintiff's Exhibit 14.

THE COURT: Do you object, counselor?

MR. PARKER: No objection, your Honor.

THE COURT: All right, mark it in.

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Baggott - direct

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2 (Plaintiff's Exhibit 14 was received in evidence.)

3 Q Mr. Baggott, at the time that you received
4 Plaintiff's Exhibit 14, did you believe the contents of the
5 letter?

6 MR. PARKER: Objection.

7 THE COURT: It doesn't much matter what he be-
8 lieved. Sustained. You are all sending me to the Hillman-
9 Kohan Vision Center.

10 MS. LIEBHARDT: Your Honor, I apologize for the
11 copies, but this was --

12 THE COURT: Okay, go ahead.

13 Q Mr. Baggott, at the time that you received this
14 letter, did Mr. Somekh indicate to you or ever state to
15 you that any part of the contents of the letter was
16 untrue?

17 MR. PARKER: Objection.

18 THE COURT: No, I will permit it. Go ahead.

19 A Shall I answer?

20 Q Yes.

21 A No, he didn't.

22 Q I didn't hear your answer.

23 A No, he didn't.

24 MS. LIEBHARDT: I have no further questions, your

25 Honor.

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1 lhjb

Baggott - direct

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2 THE COURT: Let's take a ten-minute break.

3 (Recess.)

4 MR. GARMANSKY: Your Honor, before we proceed,
5 I would like you to reconsider your ruling on the three
6 exhibits that were not admitted into evidence.

7 THE COURT: Absolutely not.

8 MR. GARMANSKY: Thank you, your Honor.

9 CROSS EXAMINATION

10 BY MR. PARKER:

11 Q Mr. Baggott, are you able to fix more specifically
12 the time when in the latter part of '73 or early 1974 you
13 had your first discussions with Mr. Somekh on the subject
14 of the repayment of the personal loan that he had with
15 Bankers Trust?

16 A More specifically? No.

17 Q Did you refer to anything to help refresh your
18 recollection as to when such a discussion took place,
19 either in the latter part of 1973 or the early part of
20 1974?

21 A Well, there were --

22 Q You can answer that yes or no, Mr. Baggott.

23 A No.

24 Q Do you know of anything that you have that would
25 help to refresh your recollection as to when the discussion

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1 first took place on the subject of the repayment of the
2 personal loan in the latter part of 1973 or the early part
3 of 1974?
4

5 A Other than that which is contained in the bank
6 credit file on the Somekh name, no.

7 Q Did you refer to that in stating today that you
8 thought it was roughly January, 1974 that you had your
9 first conversation?

10 A I think I gave evidence to the fact that it was
11 before January, '74 that we had discussions with respect to
12 the repayment of the personal loan.

13 Q Do you recall having testified on direct examina-
14 tion to the effect that there was a meeting in January,
15 roughly, 1974?

16 A Yes.

17 Q When you say roughly, can you be any more spe-
18 cific as to when the meeting did take place?

19 A The particular date of the month?

20 Q No, sir. The month.

21 A The month? Yes. January.

22 Q When you said January roughly, you meant January?

23 A Yes.

24 Q When you had your first discussions with Mr.
25 Somekh on the subject of the repayment of the loan, that

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2 is the personal loan, that was a personal loan made to Mr.
3 Somekh and Mrs. Somekh, isn't that so?

4 A Yes.

5 Q That loan was made in 1971, sir?

6 A Yes.

7 Q That was the same time that the Bankers Trust Com-
8 pany made a corporate loan to Parklane of \$750,000?

9 A Yes.

10 Q Was that loan guaranteed, that is the corporate
11 loan, sir?

12 A Guaranteed by whom?

13 Q Was it guaranteed by anybody, Mr. Baggott?

14 A Yes. We had the personal guarantees of Mr. and
15 Mrs. Somekh.

16 Q Nobody else guaranteed it, did they, Mr. Baggott?

17 A No.

18 Q When you spoke with Mr. Somekh first about the
19 repayment of the loan as you testified in your direct
20 examination, were you speaking with other of the 800
21 accountants that you supervise repayment of loans?

22 A That would take a long explanation, counselor.
23 May I give it to you?

24 Q Can you answer my question as I put it to you,
25 sir?

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MR. GARMANSKY: Your Honor, I would object on relevance.

THE COURT: No. Were you talking to anybody else in this 800 group of personal loans?

THE WITNESS: Yes.

Q At or about the time, sir, when you began to speak with Mr. Somekh on the subject of the repayment of the loan, as you testified on your direct examination, did Mr. Somekh inquire of you whether you would in words or substance prefer to have him make banking arrangements with a bank other than Bankers Trust Company?

A No.

Q Do you have any recollection of that subject having arisen at that time, sir?

A No.

Q And you did not suggest to Mr. Somekh that he make banking arrangements elsewhere than with Bankers Trust, did you, sir?

A No.

Q You testified on your direct examination, sir, that at the time that this credit loan was extended to Parklane and also to Mr. and Mrs. Somekh, that it was personally secured and a investigation had been made by the bank, do you recall that testimony, sir?

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2 A Yes.

3 Q Do you recall what the results were of that
4 investigation?

5 A The results specifically were good enough for
6 us to proceed with the loans.

7 Q Was that conclusion based upon the assets of
8 Mr. and Mrs. Somekh that you were aware of at that time,
9 sir?

10 A Yes. The assets involved the personal loan,
11 yes.

12 Q Were you aware of what those assets were, sir?

13 A Yes. We had a personal financial statement and
14 we had the package of various sureties assigned to us.

15 Q Didn't that investigation include evaluation of
16 the assets that Mr. and Mrs. Somekh had at the time of
17 the extension of the credit line in 1971?

18 A Not completely. They had, as it referred to the
19 then market value of the stock of Parklane Hosiery. We
20 had received various balance sheets of other of the proper-
21 ties that Mr. Somekh owned that he was assigning to us.
22 We had a present market value on the other equities that
23 were assigned, and that was the extent of our evaluation.

24 Q Do you recall, sir, approximately what that amount
25 to in terms of value?

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2 A It was a pretty sizeable amount in the area of
3 then market value if we were to take the combination I
4 mentioned of the market value of the Parklane Hosiery, the
5 balance represented on the balance sheet of the various
6 real estate properties he was assigning to us. I would
7 take a venture in the area of over \$2 million.

8 Q Is that on the low side, sir?

9 A No. I think that would be fairly accurate. No,
10 I don't want to be held to that figure, and it is going
11 back quite a ways, but the principal asset was Parklane
12 and pieces of property such as Tulsa, Pensauken, a co-
13 operative apartment, garden apartment here in the city and
14 various small pieces of equities that were determinable
15 as to market price at the moment.

16 Q Apart from the Parklane stock, sir, do you have
17 any recollection of the value of the other assets that
18 Mr. and Mrs. Somekh had at that time?

19 A I couldn't identify precisely at this moment.

20 Q Did you have a record of those assets, sir?

21 A Yes.

22 THE COURT: Do you have it with you?

23 THE WITNESS: I have some part of them with me,
24 yes.

25 THE COURT: Take a look at what you have.

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(Pause.)

THE WITNESS: Now, we have here a listing of various items we had assigned to us starting with the Parklane Hosiery.

THE COURT: You mean stock of Parklane?

THE WITNESS: Yes.

THE COURT: How much?

THE WITNESS: At that time, at a market value of --

THE COURT: I don't care about the market value. How many shares?

THE WITNESS: 453,000 shares. We had other equities, Gulf & Western, Oxford First Corporation --

THE COURT: How much?

THE WITNESS: \$600.

THE COURT: 10 shares?

THE WITNESS: 100. These are warrants. I beg your pardon. Shall I read off the list to you, sir?

THE COURT: Sure.

THE WITNESS: Parklane Hosiery, 453,000 shares, market value was 3. Equity Funding, we had no value assigned at that time. He had 1,030 shares. Sunnydale Farms, 1200 shares at \$1. Then we had 40 East 49th Street Corporation, which was a piece of real estate here in the

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Baggott - cross

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city, no value on that. It is listed as a package. The
York Servicing Corporation, no value on that. Windsor
Terrace, same on that. Guardian Bank, this is a very
poor copy I have here, 100 shares of Guardian Bank of
Houston. There is no value on it. I mentioned the Gulf
& Western. The Oxford First Corporation, 105 shares at 6.
103 shares of Hurst Performance at 5. Diversified Data
Services, 200 shares at 3. Business Information Tech-
nology, 5,000 shares, no recordable value.

Then we had another piece of property, 56th
Street Corporation, no value assigned to that. A mortgage
note of 140 Fulton Street Holding Company, \$50,000.
Mortgage note, 343 Great Neck Corporation, 92,000. Mort-
gage note of Chestnut Associate, 127,000.

The total dollar we had assigned as value was
a little more than \$2 million, 1,367,719.

(Continued on next page.)

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Q That does not take into account, does it, sir, those assets which you indicated in your recital you had no assigned value for?

A That is true.

Q So that any value that they had would be in addition to the figure you gave us, is that true, Mr. Baggott?

A That is true.

Q Let me ask you this, Mr. Baggott.

In respect of the items you just recited, are those items that date from 1971?

A Yes.

Q Isn't it the fact, Mr. Baggott, subsequent to 1971 from time to time, Bankers Trust was informed of the assets that Mr. and Mrs. Somekh had and values that they had?

A The only additional information --

Q Can you answer my question?

A I would have to put a note to that.

Q You were not informed?

A No, other than our own determination.

Q Now, sir, isn't it the fact that in February 1974 you asked Mr. Somekh to provide an update on the various real estate enterprises which he has and which you

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1 stated the bank held in one form or another?

2 A Yes.

3 Q That is the fact, is it not?

4 A Yes.

5 Q When you called for an update, that was because
6 you had previously received information from time to time
7 as to the assets, did you not?

8 A No. It refers to the original valuation at the
9 time of the loan.

10 Q So that from the time of the original loan until
11 February of 1974, you did not require any update of Mr.
12 and Mrs. Somekh with respect to their personal loan?

13 A That could be correct, yes.

14 Q Sir, do you recall when the last time was that
15 Bankers Trust received information concerning the assets
16 of Mr. and Mrs. Somekh?

17 A Concerning the assets or the evaluation of them?

18 THE COURT: Either one. Let's start with assets.

19 A Well, we received the assets at the time of the
20 original loan in connection with the prime asset the stock
21 of Parklane Hosiery, there was a day-to-day market value
22 on the stock and subsequently we knew what the market
23 value was day-to-day.

24 Q What I asked you was, whether you recall the
25

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2 laSt time Bankers Trust received information specifying
3 assets that Mr. and Mrs. Somekh had.

4 A No, I don't recall the last time.

5 Q When communications came from Mr. Somekh to
6 the bank, whether it was to you or through one of your
7 colleagues at the bank, would you have occasion to see
8 those letters?

9 A Yes.

10 MR. PARKER: Please mark this as Defendant's
11 Exhibit A.

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12 (Defendant's Exhibit A marked for identifica-
13 tion.)

14 Q Mr. Baggott, would you be good enough to look at
15 Defendant's Exhibit A.

16 MR. PARKER: Your Honor, may I take a moment to
17 show that to counsel?

18 THE COURT: Sure.

19 (Pause.)

20 A Yes.

21 Q Now, sir, you had occasion to see that letter
22 when it was received, did you not?

23 A Yes, I did.

24 Q That is a letter dated April 25, 1975 from Mr.
25 Somekh to Mr. Treanor?

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A That is correct.

Q And Mr. Treanor's name is T-r-e-a-n-o-r, Mr.
Robert Treanor?

A Yes.

Q Who is Mr. Treanor?

A He is an associate of mine at the bank. He is
a junior officer.

Q And he was a junior officer on the date of April
25, 1975, the date this letter was received?

A That is correct.

Q That letter was in the nature of a report, was
it not, on certain assets held by Mr. and Mr. Somekh?

A Correct.

MR. PARKER: If your Honor please, I offer in
evidence Defendant's Exhibit A, the letter just described.

MR. GARMANSKY: I would like Mr. Parker to explain
the relevancy of offering a document in April of 1975.

MR. PARKER: I can do that with an additional
question were it necessary.

THE COURT: Go ahead.

Q Do you know whether these assets that are here
listed, do you recollect any of them as being held before?

A Yes. I read off some of them.

Q And some of them go back to 1971, do they not?

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Baggott - cross

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A Yes.

MR. PARKER: I offer the document.

MR. GARMANSKY: Again, what is the relevancy?

THE COURT: I don't know, but I will find out.

Let me see it.

By the way, as of April 25, 1975, was it being
paid off?

THE WITNESS: No.

MR. PARKER: If your Honor please, may I point
out that on the direct examination of Mr. Baggott --

THE COURT: Wait a second, you are about to win.

Mark it in evidence.

(Defendant's Exhibit A received in evidence.)

Q On your direct examination, sir, you had referred
to a Rite-Aid mortgage; do you recall that?

A Yes.

Q That was an asset of Mr. Somekh in 1974, was it
not?

A Yes.

Q And that was an asset that Mr. Somekh sold in
1974, is it not?

THE COURT: If you know.

A He sold it. I don't recall the exact date. I
think it was after '74.

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2 Q But you don't see it listed on Defendant's
3 Exhibit A, the letter to Mr. Treanor from Mr. Somekh of
4 April 25, 1975, do you, sir?

5 A No, but it was in our collateral package.

6 Q When you say the collateral package, you mean the
7 collateral package of Bankers Trust Company?

8 A The collateral package of Bankers Trust support-
9 ing the personal obligation.

10 Q Right, sir.

11 Do you recall, sir, the amount for which the
12 Rite-Aid mortgage was sold by Mr. Somekh?

13 A It was sold at a discount. I seem to think of
14 an amount in the area of 70 to \$80,000.

15 Q Do you recall that the face amount of the Rite-
16 Aid mortgage was \$250,000?

17 A Yes.

18 Q Do you not recall, sir, that the discounted price
19 amounted to \$175,000?

20 A I am not familiar with what the actual settle-
21 ment was. It was substantially below the face.

22 Q And you don't recall the figure of \$175,000?

23 A Now that you mention that figure, I do begin to
24 recall.

25 Q In Defendant's Exhibit A which is the letter

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2 from Mr. Somekh to Mr. Treanor at Bankers Trust dated
3 April 25, 1975, the second paragraph; there is a refer-
4 ence to assets other than those listed and in particular,
5 reference is made to jewelry.

6 Now, sir, do you know what the value was in 1974
7 of the jewelry owned by Mrs. Somekh?

8 MR. GARMANSKY: Objection.

9 May I have a copy of the exhibit, and I would like
10 to see it.

11 THE COURT: Do you have any knowledge what the
12 value of the jewelry was?

13 THE WITNESS: No.

14 Q Had you ever inquired, sir?

15 A I don't recall ever inquiring.

16 Q But you knew that Mrs. Somekh did own jewelry?

17 A No, I wasn't familiar at all with that. I never
18 asked a question and as far as I know, Mr. Somekh never
19 volunteered it.

20 Q Mrs. Somekh was one of the obligors on the loan
21 about which you testified on direct examination, is that not
22 so?

23 A That is right.

24 Q Mr. Baggott, in the period that you were discuss-
25 ing with Mr. Somekh the repayment of the personal loan,

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1 did you ever direct Mr. Somekh to liquidate any specific
2 holdings there?
3

4 A No, I did not order him. As I recall I did not
5 order him to liquidate any particular item. He volun-
6 teered the Rite-Aid as the quickest liquidity, but the
7 obligation, the personal secured loan was put on for a
8 two year period and would be liquidated in that period
9 by the end of two years, whether it came off -- whatever
10 came off.

11 Q Wasn't it a demand loan?

12 A Yes.

13 Q A demand loan is not a two year loan, is it,
14 Mr. Baggott?

15 A I would like to answer that question after dis-
16 cussing it with counsel.

17 THE COURT: Do you have counsel here?

18 THE WITNESS: Yes.

19 THE COURT: Sure, go ahead.

20 Wait a second.

21 How much longer do you expect to be?

22 MR. PARKER: I would think about a half hour,
23 maybe a little bit more, but I am not able to judge.

24 THE COURT: When can you be back?

25 THE WITNESS: I cannot come back tomorrow.

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Baggott - cross

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THE COURT: How about the next day?

THE WITNESS: I am involved out of town tomorrow.
I may be free late tomorrow afternoon from Connecticut.

THE COURT: Would you be agreeable to com the
following day?

THE WITNESS: I could come in the afternoon the
following day.

THE COURT: How about Friday morning? Can you
ask your boss?

THE WITNESS: I am talking to him right now.

All right, I will be here Friday morning.

THE COURT: We will adjourn at this time since
I have a note from the jury and it's close to the end of
the day.

(Court adjourned to June 3, 1976, at 10:00
a.m.)

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WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Herbert N. Somekh	3			
Thomas E. Baggott	26	68		

EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
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11	52	53
12	56	
13	56	
14	66	67
<u>Defendant</u>		
A	78	80

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SECURITIES AND EXCHANGE COMMISSION

V.

76 Civ. 2024

PARKLANE HOSIERY CO., INC.,
HERBERT N. SOMEKH

June 3, 1976
10:00 a.m.

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(Trial resumed.)

HERBERT N. SOMEKH, resumed.

THE COURT: Mr. Somekh, you recognize you are
still under oath.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION (Continued)

BY MR. GARMANSKY:

Q Mr. Somekh, I am showing you Plaintiff's Exhibit
1 which was received into evidence yesterday. Was that
mailed to all the shareholders of Parklane on or about
September 24, 1974?

A To the best of my knowledge, it was.

Q Was Plaintiff's Exhibit 1 also filed with the
Securities and Exchange Commission?

A To the best of my knowledge, it was, sir.

THE COURT: Mr. Somekh, on the copy filed with

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the SEC, did you sign it?

THE WITNESS: If I can see the signature, sir, then I could --

THE COURT: I don't have it. Do you recall?

THE WITNESS: I don't, sir.

Q Mr. Somekh, yesterday you testified that you discussed going private with Mr. Sol Silverman. To the best of your recollection, that was your first discussion you had with anyone concerning going private, is that correct?

MR. PARKER: Objection, your Honor. I think the record speaks for itself. I don't think there is any need for repetition here.

THE COURT: I think it is a lead-in to the next -- go ahead, answer it.

A Yes, sir.

Q When was the next conversation or discussion you had with anyone concerning going private with Parklane?

A Probably a few weeks later or a few days later at Kaye, Scholer.

Q This would be in July, 1974, sir?

A Probably either late June or July.

Q Who was present at Kaye, Scholer?

A Jack Friedman usually is the fellow I talked to.

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2 Q Is that your best recollection, Mr. Friedman was
3 present for this conversation?

4 MR. PARKER: He didn't identify any particular
5 conversation, your Honor. The witness is trying to re-
6 call.

7 THE COURT: It is the next conversation he had
8 after talking with Silverman. That's the way I understood
9 it. Do you want a date on it? About what time was it?

10 Q Can you give us the exact date, Mr. Somekh?

11 A No, sir, I can't.

12 Q Would you please continue with your answer? Mr.
13 Friedman was present, is that your best recollection?

14 A Sure.

15 Q Anyone else present?

16 A Well, it is difficult to say, sir, because I
17 know so many people at Kaye, Scholer, and, as I mentioned
18 yesterday, other people may have drifted in and out of the
19 office.

20 Q What is your recollection, Mr. Somekh?

21 A I really don't remember the meeting.

22 Q You have no recollection one way or another?

23 A No, sir.

24 Q When was your next meeting or discussion concern-
25 ing going private with Parklane?

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Somekh - direct

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2 A I think there were several during, you know,
3 late June or early July. I don't know that there were
4 any real specific pow-wows regarding the matter. You know,
5 I may be there and I would ask Jack Friedman a question,
6 and this would go on. I think the first serious discussion
7 was in July or maybe either late July or early August when
8 I took Sol Silverman and Nate Lubow to see Jack Friedman
9 and discussed the ramifications of the matter.

10 Q Late July or early August?

11 A Yes.

12 Q Was this after the board of directors meeting of
13 July 26th at Parklane in 1974?

14 A Probably either -- just around that time.

15 Q That's your best recollection?

16 A Yes.

17 Q Prior to July 26, 1974, how many discussions
18 did you have concerning Parklane becoming a private company
19 at which Mr. Lubow was present?

20 MR. PARKER: If your Honor please, I have to
21 interject an objection again. I think I had stated yes-
22 terday and I will state again that the issue here is not
23 the fact of the company going private. There are other
24 issues which have been framed by the complaint here. I
25 think that Mr. Garmansky has had enough freedom here in

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Somekh - direct

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pursuing the question which is not relevant. I object.

THE COURT: I will permit it. Go ahead. Answer it.

A I really don't remember.

Q Was there more than one?

A I doubt it.

Q One is your best recollection?

A I don't know, because Nate may have been at the office and I may have talked to him or I may have talked to him on the phone, but I really don't remember. I mean, these are people that are on going that we do business with, and whether he was on the phone or I may have been asking him about something else and the discussion may have popped up, I really don't remember very clearly. It is two years now.

Q Mr. Somekh, again I show you what has been marked for identification as Plaintiff's Exhibit 2, at page 103, a transcript of yours dated February 13, 1975.

Mr. Somekh, do you recall being asked these questions and do you recall giving these answers, line 2 --

MR. PARKER: If your Honor please, I object to the use of the transcript in this manner. There is no reason for use of the transcript. There has been no foundation laid for it.

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THE COURT: Let me hear the question.

MR. PARKER: What Mr. Garmansky is undertaking to do, your Honor, is simply read from a transcript. I don't think he has laid a foundation for it.

THE COURT: I don't know. Let me hear the question.

"Q When was the next conversation?

"A I really don't know.

"Q Was it in June or July of 1974?

"A It had to be in July, '74.

"Q Okay. Who was this conversation with?

"A They were all really with Jack Friedman or with Silverman.

"Q Anyone else?

"A Maybe Nate Lubow, who was a partner at Kaye, Scholer and Clarence, Rainess, who was involved with our account.

"Q Mr. Lubow?

"A Yes."

A Mr. Garmansky, I think I stated the same thing before.

Q Please answer the question.

MR. GARMANSKY: Your Honor, I wish the witness' response stricken from the record.

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2 THE COURT: Absolutely not. It will stand. Is
3 this to impeach what he testified to before?

4 MR. GARMANSKY: Yes, your Honor. At this time he
5 testified that Mr. Lubow was present.

6 THE COURT: What's the impeachment? What's the
7 contradiction?

8 MR. GARMANSKY: I just said he doesn't recall
9 Mr. Lubow being present.

10 If your Honor pleases, I think this is dancing
11 on the head of a pin.

12 THE COURT: I will let it stand, but, come on,
13 let's get on to something of substance.

14 Q Mr. Somekh, did you believe in or around June or
15 July, 1974 that it was a good idea to bring Parklane back
16 to the status of a privately-owned company?

17 MR. PARKER: Objection.

18 THE COURT: He can answer it, sure. It is
19 fairly obvious that the answer is yes. Go ahead.

20 A Yes, sir.

21 Q Did you ever state to anyone your reasons for this
22 belief that it was a good idea to bring Parklane back to
23 the status of a privately-owned company?

24 A Yes, sir.

25 MR. GARMANSKY: I'd like to mark as Plaintiff's

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1 lnjb Somekh - direct 93

2 Exhibit 15 the transcript dated March 6, 1975.

3 (Plaintiff's Exhibit 15 was marked for identi-
4 fication.)

5 Q Mr. Somekh, would you turn to page 218, please,
6 of that transcript. Do you recall giving testimony before
7 the Securities and Exchange Commission on or about March 6,
8 1975?

9 A Yes, sir.

10 Q Do you recall being placed under oath at that
11 time?

12 A Yes, sir.

13 Q Do you recall being asked questions and do you
14 recall giving answers?

15 A Yes, sir.

16 Q Do you recall these questions and do you recall
17 giving these answers, line 1, page 218:

18 "Q Did you ever" --

19 A Mr. Garmansky, you didn't ask me who I talked
20 to.

21 MR. PARKER: Your Honor, I object --

22 THE COURT: Wait. Don't all talk at once. Not
23 only can't I hear it, but the court reporter can't hear
24 it.

25 MR. PARKER: I again very reluctantly and with

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great respect interpose an objection to the introduction of this transcript without laying a foundation for it.

THE COURT: We will see where it is going.

"Q Did you ever discuss with anyone the reasons why you believed it was a good idea for Parklane to go private?

"A Not to the best of my knowledge."

Q Mr. Somekh, do you recall being asked that question and do you recall that answer?

A Yes, I remember a conversation with my wife, Mr. Garmansky.

Q Please answer the question, Mr. Somekh.

A I did.

Q Do you recall being asked that question and do you recall giving that answer?

A I recall giving that answer at that time. Since then my memory has been refreshed, sir.

MR. GARMANSKY: I wish the last response of the witness be stricken.

THE COURT: No, it will stand.

Q If you were asked this question today, would your answer be the same?

A No, sir. I would say I had a conversation with my wife about it.

Q What occurred between March 6, 1975 and today to

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2 cause you to change your answer?

3 A I asked my wife.

4 MR. PARKER: I object to the question --

5 THE COURT: It is a characterization. Don't
6 worry about it. Go ahead.

7 A I asked my wife and she told me I talked about
8 it in June or July.

9 Q When did you ask your wife?

10 A Last night.

11 Q That's the truth, Mr. Somekh?

12 A That's right, sir.

13 THE COURT: Oh, yes, sustained.

14 Q Who else did you talk to --

15 THE COURT: Mr. Parker, I think you ought to
16 stand beside this man. I don't care.

17 Q Mr. Somekh, who else did you talk to beside your
18 wife why it was a good idea for Parklane to go private?

19 A I don't think I discussed it thoroughly with
20 anybody, sir.

21 Q Did you discuss it with anyone at all?

22 A No, sir, not that I remember.

23 MR. PARKER: You're excluding counsel, of course,
24 Mr. Garmansy?

25 THE COURT: Yes, I would assume that. He has
already testified that he talked to counsel about it.

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AM 2

1 1 rkmch Somekh-direct 96

2 Q Mr. Somekh, did you ever ask the other members

3 of the board of directors of Parklane concerning their

4 reasons for returning Parklane to the status of a private

5 company?

6 A No, sir.

7 Q Do you know a Mr. Baggott, Thomas Baggott?

8 A Yes, sir.

9 Q Mr. Baggott works at Bankers Trust; is that

10 right?

11 A Yes, sir.

12 Q Do you and/or Parklane have any business

13 relationships with Bankers Trust today?

14 A Not today, sir.

15 Q Did you ever?

16 A Yes, sir.

17 Q What were those business relationships?

18 A Very extensive relations. All the personal

19 accounts were with Mr. Baggott. The Parklane account

20 was with Mr. Baggott. The Riverbend account was with Mr.

21 Baggott. Mr. Baggott must have handled between ten and

22 twenty different accounts.

23 Q When did this business relationship end?

24 A It ended substantially the end of 1975, sir.

25 Q In August of 1974, how much money did you owe

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Somekh-direct

2 Bankers Trust in your individual capacity?

3 A Altogether about \$4 million, one way or the
4 other.

5 Q Just in your individual capacity. No
6 guarantees that you signed for --

7 A My wife and myself signed on everything and
8 there was about \$4 million worth of signatures.

9 THE COURT: Look, some of the loans were
10 made directly to Parklane.

11 THE WITNESS: And some were made to shells
12 which operated real estate.

13 THE COURT: What Mr. Garmansky is interested
14 in is stuff that you and your wife personally were
15 involved in, none of your shells or anything else.
16 Just personal loans.

17 THE WITNESS: Maybe 8, 9 hundred thousand
18 dollars. Around there.

19 Q How much money did Parklane owe to Bankers
20 Trust?

21 A \$750,000.

22 Q How old was your personal loan, this 8 or 9
23 hundred thousand dollars?

24 A It was of the same inception date of the Parklane
25 loan which had to be back in September '71.

1 3 rkmch Somekh-direct

2 Q Since that time, Mr. Somekh, from September '71
3 to August of '74, did you pay off any part of your personal
4 loan?

5 A I think I only paid him \$80,000 which I received
6 from the payment of a note that was due me.

7 Q Is it a fact, Mr. Somekh, in 1973, Bankers
8 Trust began to ask you to repay your personal loan?

9 A Not to the best of my recollection, sir.

10 Q When for the first time, Mr. Somekh, do you
11 recall Bankers Trust asking you to begin repayment on
12 your personal loan?

13 A The first time there was anything about it was
14 when I received a letter from Tom, I think in January --

15 THE COURT: Tom Baggott?

16 THE WITNESS: Yes.

17 A -- because we didn't have any phones.

18 Q January of what year?

19 A 1974.

20 Q That is when you recall Mr. Baggott asking
21 for repayment?

22 A That is right, sir.

23 Q Do you recall meeting with Mr. Baggott from
24 January of 1974 through September 1974 to discuss your
25 personal loan?

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Somekh-direct

2 A I certainly did not meet with Mr. Baggott
3 in January because we had the fire and I didn't leave the
4 office at all. It had to be either late February or
5 early March, which was the first time that I went to the
6 city.

7 Q You are not listening to the question, Mr.
8 Somekh.

9 Do you recall meeting with Mr. Baggott in
10 January 1974 through September 1974 to discuss your
11 personal loan?

12 A Sure.

13 Q How many times did you meet with Mr. Baggott
14 to discuss your loan?

15 A Probably three times, two or three times.

16 Q That is your best recollection?

17 A Yes.

18 Q When do you recall these occasions you met
19 with Mr. Baggott?

20 A I think the first occasion that I can recall
21 was either very late February or early March.

22 Q When was the next time?

23 A It had to be a couple of months later.

24 Q June of 1974?

25 A It could be. I really am not sure.

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Q Is that your best recollection?

A Yes.

Q When was the next time?

A Probably a couple of months later.

Q Around August, September, 1974?

A Most likely.

Q And did you also talk with Mr. Baggott on the telephone?

A Once in awhile.

Q Through the same period of time, January '74 to September '74, approximately how many times, concerning your personal loan?

A Concerning my personal loan?

Q Among other things.

A Never, really. There was never a call specifically --

Q I didn't say specifically. I said concerning your personal loan.

A I don't think there was any telephone conversations about the subject.

Q That is your best recollection?

A That is my best recollection.

Q Did you correspond with Mr. Baggott concerning your personal loan?

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A Oh, yes.

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Q Concerning this meeting in or around February, March, 1974, the first meeting with Mr. Baggott, as you recall it, who was present?

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A Mr. Baggott, Mr. Hut, Mr. Lubow. There may have been an assistant of Mr. Baggott. I am not so sure. And myself.

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Q And Mr. Hut and Mr. Lubow are from Clarence, Rainess?

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A Yes.

Q What was discussed?

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MR. PARKER: If your Honor pleases, I again interpose an objection to this line of inquiry.

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It has nothing to do with the issues here. The issues are framed here by a pleading. They are framed in other ways. There has been memoranda submitted to your Honor by both sides, and this is the pursuit of an inquiry that is not even tangential to the issues that are here.

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THE COURT: I will take it anyway.

A Mr. Baggott indicated that he would like for me to make some effort to make some paydown on the loan.

I suggested that maybe if Mr. Baggott really felt -- didn't want the loan, I would make other

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2 arrangements.

3 Mr. Baggott specifically said no, there was
4 no need for me to make any other arrangements. All he
5 would like for me to do was to make some effort liquidating
6 some holdings and giving him some paydown.

7 Q Anything else, Mr. Somekh?

8 A Nothing really that I recall.

9 Q Do you remember discussing an arrangement
10 you were to make with Lehman Brothers for sale of the Tulsa
11 property, or part of it?

12 A The Lehman partnership was effective
13 January 1, 1973. I really can't understand Mr. Baggott's
14 lack of knowledge regarding the transaction.

15 MR. GARMANSKY: Your Honor, I wish the answer
16 stricken from the record.

17 THE COURT: Please. It will stand.

18 Answer the question: Did you discuss with
19 Baggott selling this property?

20 THE WITNESS: Not at that particular time, sir.

21 Q Isn't it a fact, Mr. Somekh, that you were
22 making arrangements to sell part of the Tulsa property
23 for approximately \$600,000?

24 A No, sir.

25 THE COURT: Are you at a break point right now?

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2 MR. GARMANSKY: It doesn't really matter.

3 THE COURT: Is this the end of the Tulsa
4 property for now?

5 MR. GARMANSKY: Yes.

6 THE COURT: We will have to recess for this
7 other case.

8 (Recess)

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2 Q Do you recall discussing with Mr. Baggott in
3 late 1973 or early 1974 the Tulsa property?

4 A Yes, sir, I am sure I must have.

5 Q Isn't it a fact that you had informed Mr. Baggott
6 that you expected funds to come in from the Tulsa property?

7 A Of course I did.

8 Q Is it also not a fact that you told Mr. Baggott
9 that these funds would be re-used to reduce your personal
10 loan?

11 A They may. I never said that they would spe-
12 cifically be, because there were other funds in addition
13 to the Tulsa funds.

14 MR. GARMANSKY: I'd like to mark as Plaintiff's
15 Exhibit 16 for identification a transcript dated October
16 20, 1975.

17 (Plaintiff's Exhibit 16 was marked for identi-
18 fication.)

19 Q Mr. Somekh, do you recall testifying at the
20 Securities and Exchange Commission on or about October
21 20, 1975?

22 A Not exactly, but I must have been there.

23 Q What is your best recollection? On or about
24 that date.

25 A If you say I was there, I am sure then I was.

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Q What is your best recollection, sir?

A I really don't remember the date.

Q Was it at or about that time, October 20, 1975?

A I don't recall, sir.

Q Do you recall appearing at three sessions, separate sessions, at the Securities and Exchange Commission?

A That's right.

Q When do you recall your last session, Mr. Somekh?

A I really don't remember.

Q At the last session, Mr. Somekh, at the Securities and Exchange Commission, do you recall being placed under oath?

A I am sure I was.

Q Mr. Somekh, could you turn to page 35?

A Yes.

Q Were you asked these following questions and did you give the following answers, line 21:

"Q Well, did the Lehman property or the Tulsa property have anything to do with your personal loan?

"A No, because that loan preceded my doing anything in Tulsa.

"Q I think the question goes to the fact that with

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this money coming in from Lehman concerning the Tulsa property, was that money going to go to reduce your personal loan?

"A It would have, yes."

A Not only that, plus any other funds that I would have had, and that's exactly what I said before, Mr. Garmansky.

Q Do you recall those questions and do you recall giving those answers?

A No, sir.

Q If you were asked these questions today, would your answer be the same?

A Yes.

Q How much money was supposed to come in from the Tulsa property?

A \$1,350,000 from the Lehman partners.

Q What were you going to do with that money?

A Construct the first --

MR. PARKER: If your Honor pleases, I don't mean to interrupt the witness --

THE COURT: Yes, this is getting a little bit out. Yes, I will sustain it.

Q Was any of the money going to go to reduce your loan?

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MR. PARKER: I think that Mr. Garmansky --

THE COURT: We have already gone through this, Mr. Garmansky. Once is enough. I was here and I heard.

Q At this meeting you had in Febroary or March with Mr. Baggott, isn' it a fact that Mr. Baggott told you he was becoming impatient with you by the lack of repayment on your personal loan?

A I don't remember his exact words, but he indicated that he would like some pay down.

Q At or about this period of time, isn't it a fact that you were trying to sell a mortgage that you owned on Rite-Aid Corp.?

A Not at that time. I tried --

Q At or about this period of time?

A No, sir.

Q When did you begin to start to sell the Rite-Aid mortgage?

A After my discussion with Mr. Baggott in late February or early March.

Q So it was at or about the time of your conversation?

THE COURT: Come on, don't quibble. Let's go.

Q You were also trying to get a second mortgage on your house, is that ~~6069142~~

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Somekh - direct

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A No, sir.

Q You were not?

A Not at that time.

Q At what time, sir?

A I had some discussion with Mr. Baggott regarding the possibility of putting a mortgage -- as a matter of fact, I asked him if he would like to do it himself, and other than that I really did not make any effort.

Q From January, 1974 through June of 1974, were you trying to sell off any of your own personal assets to reduce your loan?

A No, sir.

Q None at all?

A No, sir.

Q Isn't it a fact, Mr. Somekh, that you had a potential buyer for the property in Pensauken during this period of time?

A But the potential buyer preceded that time. There was a contract on the property during the time of my discussion with Mr. Baggott.

Q Yes, it was a potential buyer?

A No, it was more than a potential buyer. There was a contract to Tramell Crow on the property that I had given them I think in early fall of 1973.

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Somekh - direct

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Q What were you to do with the proceeds if the sale of the Pensauken took place?

MR. PARKER: I object. This is speculative, unrelated to the issues here.

THE COURT: I don't know what it is leading to. Did the deal ever go through?

THE WITNESS: No, sir.

Q As of January 1, 1974, Mr. Somekh, did you have any other outstanding personal loans at any banks other than Bankers Trust?

A Yes.

Q What banks?

A National City Bank, \$125,000.

Q How about the National Bank of North America?

A No. That was the same kind of loan as Riverbend loans at Bankers Trust. It was a loan made to 433 JV, which is a partnership in which I own one-third.

Q Did you guarantee that loan?

A The same as I guaranteed all others, sir.

Q Isn't it a fact, Mr. Somekh, that you were receiving pressure from all three banks at or around the same period of time in early 1974 for repayment of your personal loans?

MR. PARKER: Objection as to form, your Honor.

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Somekh - direct

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2 THE COURT: Sustained. Reframe the question.

3 Q Isn' it a fact, Mr. Somekh, that all three banks
4 asked you for repayment at or around the same period of
5 time, in early 1974?

6 A No, si

7 Q Please turn to page 6 of your October 20, 1965
8 transcript.

9 Mr. Somekh, were you asked these questions and
10 did you give these answers, line 11:

11 "Q In the same connection as Bankers Trust, were
12 you getting any pressure from these other two banks to
13 repay these two loans?

14 "A Yes, because these were 8-1/2 per cent loans and
15 they didn't really want personal 8-1/2 per cent loans when
16 the prime was 12-1/2.

17 "Q When did you start to get indications or re-
18 quests to pay back the loan or reduce it in the same amount,
19 or whatever?

20 "A Oh, I would say about the same time, really.

21 "Q About the same time? You are talking February,
22 March, 1974?

23 "A Yes."

24 Do you recall being asked those questions and
25 do you recall giving those answers?

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Somekh - direct

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2 A Yes, sir. However, if you ask me today, I would
3 say that the requests from the banks came at various times
4 between January and probably July, and part of the re-
5 quests really were derived or came about because of the
6 loss of records. In January, 1974 all my records were
7 lost, and I really couldn't follow through on most of this
8 information or with anybody.

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9 (Plaintiff's Exhibits 17 and 18 were marked for
10 identification.)

11 Q Do you recognize Plaintiff's Exhibit 3 in evi-
12 dence, Mr. Somekh?

13 A No.

14 Q You have never seen that letter prior to today?

15 A I don't remember it.

16 Q Have you seen Plaintiff's Exhibit 3 prior to
17 today?

18 A I may have. I am sure if it was addressed to
19 me from Tom, I must have gotten it.

20 Q You have no recollection of that?

21 A Not at that particular time, because I really
22 was very involved in the fire, and there was -- I had very
23 little time of my own.

24 Q Did you ever give Mr. Baggott promises or commit-
25 ments to reduce your personal loan at or about the

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Somekh - direct

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2 beginning of 1974?

3 A I wouldn't say they were promises. There were
4 always conversations as to what's happening and what
5 things may or may not occur.

6 Q Do you recognize Plaintiff's Exhibit 17?

7 A No, sir.

8 Q You do not recall receiving this letter?

9 A No, sir.

10 Q Do you recall at or about the time, March 4,
11 1974, First National City Bank stating to you in effect
12 that they are refusing to carry your loan of \$125,000 any
13 more and they want immediate repayment?

14 A No, that's not what they said, because what hap-
15 pened was, as I said, I lost my records and I couldn't
16 send them the interest, and whoever it was there got very
17 upset because they didn't get the interest on time, and I
18 didn't know who to get in touch with, because I didn't
19 know anybody there. I never arranged the loan in the first
20 place. Then somebody called me and said that they didn't
21 get anything on this, and then they said "Well, by the
22 way, this has been on quite a while, we would like to get
23 this off." I said, Well, we will see about that," and
24 that was really about the sum and substance of the conver-
25 sation.

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Somekh - direct

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Q Would you please answer my question now? Did you call anyone from First National City Bank, at or around March 4, 1974, stating to you in substance that they refused to carry your loan of \$125,000?

A No, I do not remember the conversation.

Q Do you recognize Plaintiff's Exhibit 18?

A No, I don't recall it. If it was addressed to me, it must have gotten there.

Q But you don't recall it?

A No.

Q Do you recall a letter in or about February, 1974 from National Bank of North America telling you that they want repayment on that loan in which you guaranteed that loan?

A No, I don't, and I --

Q That is all, Mr. Somekh. The answer is yes or no.

A I do not recall the letter --

Q The answer is yes or no.

A I can explain to you why.

Q When your turn --

THE COURT: Would you two cut it out. Mr. Garmansky, a little decorum is required in this courtroom.

MR. GARMANSKY: I apologize to the court, your

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Somekh - direct

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2 Honor.

3 THE COURT: You better find out fast. You have
4 your own attorney, Mr. Somekh. He is going to fill in
5 the blank spots. Just relax.

6 Q Mr. Somekh, do Plaintiff's Exhibit 3 in evidence
7 and Plaintiff's Exhibit 17 marked for identification re-
8 fresh your recollection that you had conversations in
9 March of 1974 to bring Parklane back to the status of a
10 privately-owned company?

11 MR. PARKER: Your Honor, may I please have that
12 question read back?

13 (Record read.)

14 A not at all.

15 Q Isn' t it a fact, Mr. Somekh, that because these
16 three banks were applying pressure on you for repayment of
17 your personal loans at or about this time in early 1974,
18 that you decided to bring Parklane back to the status of
19 a privately-owned company?

20 MR. PARKER: Objection as to form, your Honor.

21 THE COURT: Sustained.

22 MR. GARMANSKY: Question withdrawn, your Honor.

23 Q Mr. Somekh, isn't it a fact that because these
24 banks wanted repayment from you in or around early 1974
25 that you decided then to bring Parklane back to the status

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of a privately-owned company?

MR. PARKER: Objection as to form, your Honor.

THE COURT: I will let him answer.

MR. PARKER: I object also on the ground of its
irrelevance and immateriality.

THE COURT: No, you can answer.

A Absolutely not, Mr. Garmansky.

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(Plaintiff's Exhibit 19 was marked for identi-
fication.)

Q Mr. Somekh, do you recognize Plaintiff's Exhibit
19 for identification?

A I don't specifically remember it, but it is my
stamp on the bottom.

Q I am sorry, sir?

A I don't remember specifically writing the letter,
but it must have been mine, and it is my stamp on the
bottom.

Q You don't recall this letter at all?

A Not specifically --

Q Do you recall it generally?

A Apparently I wrote it, because that is my --

THE COURT: You would not deny you wrote it?

THE WITNESS: Oh, no. No, sir.

MR. GARMANSKY: The plaintiff offers Plaintiff's

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Somekh - direct

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Exhibit 19 in evidence, your Honor.

MR. PARKER: Your Honor, again, for the reasons previously stated, it is our position that this is irrelevant, immaterial and not admissible.

THE COURT: Let me read it at least to find out whether it is irrelevant and immaterial.

(Pause.)

(Continued on next page.)

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Somekh-direct

2 THE COURT: I don't know what worth it has.

3 I will take it for what it is worth.

4 Mark it in evidence.

5 (Plaintiff's Exhibit No. 19 was received in
6 evidence.)

7 Q Mr. Somekh, Plaintiff's Exhibit 19 in evidence
8 states:

9 "The problem has been that I did not have a good
10 enough answer to give you. As usual, when people make
11 deals on the other side, they are very fast in making them
12 and talking about how they would handle certain things.
13 Now that I am on the other side where we have signed a
14 deal with Lehman, getting them to act is not as prompt as
15 all of us would like to see it."

16 Isn't it a fact, Mr. Somekh, that the language
17 I just read to you dealt with the \$600,000 you expected to
18 come in from Lehman?

19 A No, sir.

20 THE COURT: The answer is "no"?

21 THE WITNESS: No.

22 THE COURT: Okay.

23 Q Mr. Somekh, do you recognize Plaintiff's
24 Exhibit 6 in evidence?

25 A Yes. The substance I remember, and it must

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Somekh-direct

2 have been my letter.

3 Q Is that your signature?

4 A Yes.

5 Q Mr. Somekh, Plaintiff's Exhibit 6 states in
6 the last paragraph:

7 "Needless to say, every effort will be
8 extended in all directions to liquidate any other holdings
9 that I have at the earliest date possible."

10 Isn't it a fact, Mr. Somekh, that you were
11 going to liquidate other real estate assets in order to
12 pay down your loan?

13 A If it suited me to liquidate.

14 Q Did you ever say that to Mr. Baggott?

15 A Yes, sir.

16 Q After March 12, 1974, did you take any step to
17 begin liquidation of other properties?

18 A No, sir.

19 Q None at all?

20 A None at all.

21 Q Do you recognize Plaintiff's Exhibit 9 in
22 evidence?

23 A I don't recognize it, but it must be mine.

24 Q Is that your signature on the second page of
25 Plaintiff's Exhibit 8300153

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A Yes.

Q You don't recall sending this letter to Mr. Baggott?

A Not specifically, but I must have sent it.

Q Plaintiff's Exhibit 9 states, Mr. Somekh, under point 3:

"There are some discussions going on with Lehman as to the possibility of their buying my 50 percent of Tulsa for the payment of my cash advances against a reduced interest, to be paid somewhere down the line. I will make any deal along this line, and they indicated that there is a real possibility of making it."

What was your purpose, Mr. Somekh, in mentioning that in this letter?

MR. PARKER: Objection.

THE COURT: Let me see the letter.

(Pause)

THE COURT: Go ahead. Answer it.

A It was to bring him up to date about my relations with my partners.

Q Isn't it a fact that you were informing him about the possibility of money coming in to reduce your personal loan?

A No, because it may have been the other way

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Somekh-direct

2 around. I may have bought them out.

3 Q Thank you, Mr. Somekh.

4 The letter again states:

5 "Finally, again, Andy Garr at Kaye, Scholer
6 informs me that he has possible buyers for the apartments on
7 56th Street on a wholesale basis. I am gathering the
8 plans and the offering prospectus that was originally done
9 so that these people can have all the facts, and, again,
10 I will accept any offer that is made if an offer is made."

11 Does that refresh your recollection now,
12 Mr. Somekh, that after March 4, 1974 you took steps to
13 liquidate your properties?

14 A Mr. Garmansky, I will listen to any buyer at
15 any time that wants to buy anything that would pay me what
16 I think I want at that particular time.

17 Q Mr. Somekh, is it not a fact that if you had
18 sold the apartments on 56th Street, as you intended to do
19 in Plaintiff's Exhibit 9 in evidence, you would have paid
20 off the bank?

21 MR. PARKER: Objection, your Honor.

22 A Mr. Garmansky, I had other funds coming in at
23 that time and I could have paid the bank off from other
24 funds, if I wanted to.

25 THE COURT: Let that one stand. Withdraw your

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Somekh-direct

2 objection.

3 Q Continuing on Plaintiff's Exhibit 9 in
4 evidence:

5 "Also, I am preparing lists of everything
6 else that I may have, whether in mortgages or real estate,
7 so that they may be able to offer these, and, of course,
8 if there is any possibility of doing anything on any of
9 them, we certainly will proceed with dispatch."

10 A Very true. Any time I get somebody who is
11 going to give me money, I will take it.

12 Q Wait for a question, Mr. Somekh.
13 I only read what you wrote.

14 A Yes.

15 Q Plaintiff's Exhibit 9 is addressed to Mr.
16 Baggott?

17 A Yes, sir.

18 Q Is it not a fact, Mr. Somekh, that you were
19 informing Mr. Baggott of what you intended to do on your
20 personal assets so that you could reduce the loan which
21 he requested you to do?

22 A Mr. Garmansky, over 3-1/2 years I must have
23 had 150 conversations with Mr. Baggott. Some of them
24 included all kinds of things, including my wife's
25 actions, you know, whether she bought a mink coat or she

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didn't. This is the same, in vein with the same kind of thing.

If I was going to do anything or I thought it was relevant or material for Mr. Baggott to know, I would write him or I would tell him.

At that time the reason you will see a proliferation of letters is because we didn't have enough telephones, because it was after the fire and we didn't have any telephones in the office.

MR. GARMANSKY: Your Honor, may I have an answer to my question?

THE COURT: I believe he did answer it.

MR. GARMANSKY: I am really confused by the answer. It is a simple question, your Honor.

THE COURT: It is a simple answer, too.

MR. GARMANSKY: That's why I am confused.

May I have --

THE COURT: Sure.

Read it back.

(Record read)

MR. GARMANSKY: Your Honor, may I ask the Court a question?

THE COURT: Me? Sure.

MR. GARMANSKY: Is it your understanding that

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2 the answer is "no," the answer is "maybe," or the answer
3 is "yes"?

4 MR. PARKER: I object, your Honor.

5 THE COURT: This is ridiculous, Mr. Garmansky.

6 MR. GARMANSKY: I don't understand his answer,
7 your Honor.

8 THE COURT: That's your problem. It was in
9 English.

10 Q Mr. Somekh, Plaintiff's Exhibit 9 in evidence
11 continues:

12 "I have also inquired as to the possibility
13 of speeding things up in Pensauken, and I have not gotten
14 a response yet, but I will keep pursuing the subject."

15 What do you mean by "speeding things up in
16 Pensauken"?

17 A Asking Tramell Crow whether they wanted to
18 take possession earlier than they indicated.

19 Q This had to do with the selling of the
20 Pensauken property; is that correct?

21 A Yes.

22 Q You were going to pay down the loan with that
23 money?

24 A Not necessarily at all, Mr. Garmansky.

25 I think you are coming to conclusions that I didn't come to.

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Q I am asking the question, Mr. Somekh.

Isn't it a fact that you were going to use the funds to pay down your loan?

A Not at all.

MR. PARKER: It seems to me, your Honor --

THE COURT: He said, "Not at all." Don't worry about it. I will let it stand.

Q I show you Plaintiff's Exhibit 10 in evidence.

A Yes, sir.

Q Is that your signature?

A It is my stamp. It is not my signature.

I usually dictate my letters and my secretary, if I am not around, she will put a stamp on it.

Q You directed your secretary to place the stamp on that letter?

A Not specifically, but she does it on all letters when I am not around the office.

Q Mr. Somekh, in Plaintiff's Exhibit 10 you state to Mr. Baggott:

"In the meantime I am working on the house mortgage, which will be step number 2."

Is that in regard to your personal loan?

A Yes.

There were only two things that I ever told

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2 Mr. Baggott that I would do specifically. One was that
3 I will attempt to sell the Rite-Aid mortgage, which I did in
4 this case, and the other was possibly attempt to get a
5 mortgage on my house.

6 These were the things that I promised him or
7 discussed with him in March or late February, and therefore
8 I was just informing him that I was doing exactly what
9 I told him I would do at that meeting.

10 Q From January of 1974 until the end of June
11 of 1974, did you ever inform Mr. Baggott that you were
12 going to sell off other assets that you owned, other than
13 Rite-Aid and getting a second mortgage on your house?

14 MR. PARKER: I think this has been asked and
15 answered, your Honor.

16 MR. GARMANSKY: I have expanded the time
17 frame.

18 THE COURT: Go ahead and answer.

19 (Record read)

20 A I may very well have, but that's true of any
21 time that you talk to someone like Mr. Baggott. I mean,
22 what are we talking about?

23 THE COURT: But you may well have?

24 THE WITNESS: Oh, yes.

25 THE COURT: Okay.

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2 Q Mr. Somekh, isn't it a fact that Mr. Baggott
3 asked you to liquidate other assets for repayment of
4 your loan during the same period of time, January 1974
5 through June of 1974?

6 A No, sir. He was never specific about any
7 other assets.

8 Q That's not the question, Mr. Somekh.

9 A Would you repeat the question, Mr. Garmansky,
10 so that I would understand it?

11 THE COURT: Ask the question again.

12 MR. GARMANSKY: Mr. Reporter, please repeat
13 the question.

14 (Record read)

15 A He may very well have.

16 MR. GARMANSKY: Would you read the witness'
17 response?

18 THE COURT: I was here. What do you want the
19 witness' response for? Is this some kind of game?

20 MR. GARMANSKY: Withdraw the question, your
21 Honor.

22 THE COURT: Let's move along with this thing.

23 Q Mr. Somekh, do you recognize Plaintiff's
24 Exhibit 8 in evidence?

25 A I don't, sir, but if Mr. Baggott says he sent

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2 it to me, I must have received it.

3 Q Do you deny receiving the letter, sir?

4 A I really don't know that I did or didn't,
5 but if Mr. Baggott said he sent it to me, I must have
6 received it.

7 Q Plaintiff's Exhibit 8 in evidence states,
8 sir:

9 "At the same time I would like to again
10 direct your attention to the other personal assets which
11 could be liquidated."

12 Does that refresh your recollection that Mr.
13 Baggott asked you to liquidate other assets?

14 MR. PARKER: Objection.

15 THE COURT: On what grounds?

16 MR. PARKER: There is no foundation for the
17 question that Mr. Garmansky has asked.

18 THE COURT: Sure there is.

19 Go ahead. Answer it.

20 A I think I answered it before, sir.

21 Q The question calls for a yes or no, Mr. Somekh.

22 Is your recollection refreshed that Mr. Baggott
23 asked you to liquidate other assets?

24 A No, sir.

25 Q Mr. Somekh, do you recall meeting with

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2 representatives of Thomson, McKinnon, Auchincloss &
3 Kohlmeyer in May 1974 to discuss Parklane becoming a private
4 company?

5 MR. PARKER: This was asked and answered
6 yes.

7 THE COURT: Yes.

8 MR. GARMANSKY: That was March 1974 and this is
9 now May 1974.

10 A No, sir, I did not.

11 THE COURT: Are we going to go through month
12 by month?

13 Q Isn't it a fact, Mr. Somekh, that by May 1974
14 the only way you could pay off your bank loan was to bring
15 Parklane private, use Parklane money to reduce your loans?

16 MR. PARKER: Objection.

17 THE COURT: I will permit it. Conclusory,
18 but I will permit it.

19 (Record read)

20 A It definitely is not a fact, Mr. Garmansky.

21 Q Did your personal financial situation play
22 any role whatsoever in your decision to bring Parklane
23 back to the status of a privately owned company?

24 A Outside of the fact that it may benefit me,
25 sir, no.

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2 Q Benefit you in what way?

3 A In running my business in a better way than
4 I thought it was being run or was being run as a public
5 company.

6 Q But did your own personal financial situation
7 play any role?

8 A No, sir.

9 Q Do you know Mr. Richard Tunick?

10 A Isn't he the fellow that was at the National
11 Bank of North America?

12 Q Yes, that's correct.

13 A I met him I think once.

14 Q That is correct.

15 He was the officer in charge of your loan
16 there; is that correct?

17 A No, he wasn't, sir.

18 Q Who was?

19 A A fellow who originally -- his name was
20 David something, and he had gone to California, and the
21 only other guy that I knew there was a fellow by the
22 name of Witchendall, who was out in Long Island.

23 Tunick was a new guy who came into the picture
24 in the summer of 1974. I have never seen or heard from
25 him before.

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Q Did you ever meet with Mr. Tunick?

A Yes.

As a matter of fact, by -- not by plan, because Mr. Witchendall had called and said that he had talked to Mr. Strauss before, and I wasn't aware of his conversation with my partner, Mr. Strauss, and he said he didn't get a response from Mr. Strauss, and I apologized, and I said, "Mr. Witchendall, I will be glad to come and see you."

He had set up an appointment, and then that's the time I had met Mr. Tunick.

Q What was the time, sir?

A I really don't know. It was some time in the middle of '74, something like that.

Q Isn't it a fact it was approximately May, the end of May 1974?

A It could very well have been. It could be any time --

Q Who was present at that meeting?

A Harold Strauss and myself.

Q Mr. Tunick?

A Yes. He was called in.

THE COURT: Who else? There has to be someone who called him in.

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2 THE WITNESS: Mr. Witchendall must have called
3 him in.

4 Q How about Mr. Lubow?

5 A Mr. Lubow may have been there. I really don't
6 remember the meeting.

7 Q What was discussed at that meeting, and by
8 whom?

9 A Well, Mr. Tunick is a very small guy who sort
10 of, you know, begins to raise his voice very fast, and
11 he said, "Well, you know, the bank had lent us money at
12 8-1/2 percent and the prime rate was 12-1/2," and they
13 were very upset about it and he would like to do something
14 about it, and he feels that we should do something that
15 would make up for the bank this time period that they
16 put the money out at 8-1/2.

17 His idea was that we should extend the loan at
18 18 percent or something, for a period of time that was
19 equivalent to the time that the money was out at 8-1/2
20 percent.

21 Q Anything else?

22 A Not particularly.

23 Q Who first raised the point about extending
24 the loan, yourself or the bank?

25 A The bank, I am sure.

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Q The bank did, sir?

A Yes, sir.

Q Prior to this meeting, did you have any indications that National Bank of North America wanted repayment on this loan?

A No, because I tried to tell you earlier, Mr. Garmansky, that the letter --

Q Thank you, Mr. Somekh.

THE COURT: The answer is "no." Don't worry about it. Your counsel will take care of it.

Q Mr. Somekh, is it not a fact that this meeting with Mr. Tunick, when Mr. Tunck asked for repayment of the loan, you informed him that you extremely illiquid?

A Well, that's the best answer I could give Mr. Tunick.

(Continued on next page)

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THE COURT: Did you say that?

THE WITNESS: I may have. I really don't know.

Q Is it a fact, Mr. Somekh, you requested the loan be renegotiated?

A No, sir.

Q Isn't it a fact, Mr. Somekh, that you told Mr. Tunick that you were unable to meet his demands for repayment and if repayment was pressed in a lawsuit, you could not pay it?

A That is not true at all, Mr. Garmansky.

THE COURT: Whether it's true or not, did you say it?

THE WITNESS: No, sir.

Q Mr. Somekh, when for the first time do you recall a meeting of the board of directors of Parklane to discuss Parklane becoming a public company?

MR. PARKER: We object again as we have in the past on the grounds this matter is irrelevant and immaterial to the issues here.

THE COURT: I will permit it.

A July 26, 1974.

Q Mr. Somekh, prior to this date, did any of the three banks we have been discussing, Bankers Trust, First National City Bank, National Bank of North America ever

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threaten you with legal action if you did not repay your loan?

A Not at all, not in the way you are saying it.

MR. GARMANSKY: I would like to mark this document as Plaintiff's Exhibit 20.

(Plaintiff's Exhibit 20 marked for identification.)

Q Mr. Somekh, do you recall receiving a registered letter on or about July 23, 1974 from First National City Bank requesting repayment of your loan?

A I don't recall the letter, sir.

Q Do you recognize Plaintiff's Exhibit 20 for identification?

A I don't recognize it but if it was addressed to me, it must have come to me.

Q Do you deny receiving that letter?

A I don't deny anything, Mr. Garmansky, but I don't remember the letter.

Q Does that letter now refresh your recollection that prior to the July 26th board meeting of Parklane, you were threatened with legal suit unless you repaid your outstanding loan to First National City Bank?

A The letter is dated the 23rd. I obviously couldn't have gotten it on the 26th, so I think you are

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1 just putting things together --

2 Q I said prior to the 26th.

3 A It was not in my hands prior to the 26th.

4 Q You remember the letter, then?

5 A No, I don't.

6 Q How do you know it was not in your hands prior
7 to the 26th?

8 A I would have remembered something like this
9 before and I didn't remember it and apparently didn't
10 make an impression even if I got it.

11 Q That would not have impressed you?

12 A No, hell no.

13 MR. PARKER: I object, your Honor.

14 THE COURT: Now you are getting argumentative.

15 Q Isn't it a fact, Mr. Somekh, First National City
16 Bank did actually sue you for non-payment of your loan?

17 A Yes, because I wanted them to.

18 MR. GARMANSKY: Your Honor, I wish that response
19 be stricken after "no."

20 THE COURT: No. Let it stand.

21 MR. GARMANSKY: I would like to have marked for
22 identification this document as Plaintiff's Exhibit 21.

23 (Plaintiff's Exhibit 21 marked for identifica-
24 tion.
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2 THE COURT: You do read the law journal? If
3 you look under U.S. District Court for the Southern
4 District of New York, you will see that all exhibits are
5 supposed to be premarked.

6 MR. GARMANSKY: I apologize to the court.

7 THE COURT: You will know the next time.

8 Q Mr. Somekh, do you recognize Plaintiff's Exhibit
9 21?

10 A No, sir.

11 Q You do not recognize it?

12 A No. Should I?

13 THE COURT: All right. You don't recognize it.

14 Q Mr. Somekh, did you ever see a copy of Plain-
15 tiff's Exhibit 20 prior to today?

16 A 21?

17 Q 21, I am sorry, sir.

18 A I may have.

19 MR. GARMANSKY: May I take out one minute?

20 THE COURT: Sure.

21 (Pause.)

22 THE COURT: He just said he couldn't identify
23 21 and he is not sure whether he ever saw it before.

24 MR. GARMANSKY: I am prepared to impeach the
25 witness, your Honor, because he previously testified he

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2 did.

3 THE WITNESS: I said I may have.

4 THE COURT: Impeach him. Let's get that part
5 over with.

6 Q Mr. Somekh, I am handing you Plaintiff's Exhibit
7 15 marked for identification. Would you plea. to
8 page 211. Were you asked these questions, Mr. Somekh,
9 and did you give these answers, line 2?

10 MR. GARMANSKY: I would like to mark as a Defense
11 Exhibit 8, Somekh Exhibit 8, minutes of the board of
12 directors meeting of July 26, 1974, five pages.

13 "Q Do you recognize Exhibit 8 for identification?

14 "A Yes."

15 A I recognized it when you showed it to me before
16 and I don't now.

17 THE COURT: All right.

18 I will take a verdict. It's ten minutes until
19 lunch time, I have an order to show cause at 2:00. I
20 expect you back here at ten minutes after two.

21 (Luncheon recess.)
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AFTERNOON

SESSION

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2:10 p.m.

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(In open court)

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THE COURT: Proceed, Mr. Garmansky.

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DIRECT EXAMINATION CONTINUED

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BY MR. GARMANSKY:

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Q Mr. Somekh, do you recognize Plaintiff's

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Exhibit 21 for identification?

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MR. PARKER: When you say "recognize,"

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Mr. Garmansky, and I am addressing the Court with the

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greatest respect, I wonder if we could rephrase that.

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THE COURT: "Can you identify the document?"

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Q Can you identify the document?

18

A It's minutes of a meeting of the board of

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directors of Parklane Hosiery Company, Inc., on July 26,

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1974, sir.

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THE COURT: Have you had a chance to read that

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document?

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THE WITNESS: I must have read it some time

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back.

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Can I look at it now?

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THE COURT: Sure.

(Pause)

THE WITNESS: All right.

THE COURT: Can you identify it?

THE WITNESS: Yes.

THE COURT: Does that accurately reflect
what happened at that meeting?

THE WITNESS: Yes, sir.

MR. GARMANSKY: Plaintiff offers Plaintiff's
Exhibit 21 in evidence.

MR. PARKER: I object, your Honor, on the
grounds it's irrelevant and immaterial to this hearing.

THE COURT: I will permit it.

(Plaintiff's Exhibit No. 21 received in
evidence.)

Q Mr. Somekh, at this board meeting of Parklane
held on or about July 26, 1974, did you give any reasons
why you felt Parklane should return to the status of a
private company?

A No, sir.

Q Did anyone --

THE COURT: Did I hear that answer right?

THE WITNESS: No, sir.

Q Did anyone give any reasons?

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A No, sir.

Q Do you recognize Plaintiff's Exhibit 22 --

THE COURT: Can he identify.

Q Can you identify Plaintiff's Exhibit 22?

A It's minutes of a special meeting of the
board of directors of Parklane Hosiery Company August 29,
1974, sir.

THE COURT: Take a look at it.

(Pause)

THE WITNESS: Yes, sir.

THE COURT: Do they accurately reflect what
took place at that meeting?

THE WITNESS: Yes, sir.

MR. GARMANSKY: Plaintiff offers Exhibit 22
in evidence.

MR. PARKER: Same objection.

THE COURT: Overruled.

Mark it in evidence.

(Plaintiff's Exhibit No. 22 received in
evidence.)

Q Mr. Somekh, Plaintiff's Exhibit 22 refers to
a board meeting held on or about August 29, 1974?

A Yes, sir.

Q You were present at that board meeting; is that

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2 correct?

3 A Yes, sir.

4 Q Did you give any reasons at that meeting
5 why you felt Parklane should go private?

6 A Yes, sir.

7 Q At that board meeting, Mr. Somekh, did you have
8 a draft copy of the proxy statement that was to be
9 submitted to the shareholders, that is, Plaintiff's
10 Exhibit 1, a draft copy of it?

11 A Yes, sir.

12 Q At that board meeting, was there any discussion
13 of the draft copy of Plaintiff's Exhibit 1?

14 A Yes, there was some.

15 Q Was there any discussion about the merger
16 of Parklane into the new PLHC corporation?

17 A No. There was no discussion about the specifics
18 of merger. There was general discussion about the total
19 action that was going to take place.

20 Q Did you, yourself, Mr. Somekh, make any
21 comments about the draft proxy, that is, Plaintiff's
22 Exhibit 1?

23 A Not particularly.

24 Q Did you make any comments whatsoever? Yes or
25 no?

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A Yes, I did make some comments.

Q What were they?

A One, I think I stated some of the reasons for going private, probably, and I think there was some discussion about the appraisal letters that were received, and I think the attorneys, Nate Lubow made some comments about some of the text in the proxy statement.

Q Just you.

A I really didn't have too much to say.

Q I have just placed before you a copy of your transcript, Plaintiff's Exhibit 15 for identification.

Would you turn to page 233, please?

Were you asked the following questions and did you give the following answers?

MR. PARKER: There has been no foundation laid for the use of this document.

MR. GARMANSKY: Your Honor, I am trying to impeach him.

THE COURT: Ask the question.

Q Line 10:

"Q The chairman then opened the floor for discussion of the draft of the proxy statement and plan of merger.

"Now, the plan of merger in new PLHC corporation,

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2 did you make any comment about that merger with new
3 PLHC corporation here referred to as 'new company'?

4 "A I did not.

5 "Q Did you make any comments about the proxy?

6 "A I did not.

7 "Q Okay.

8 "Did anyone at the meeting make any comments
9 about the plan of merger?

10 "A Not that I recall."

11 Do you recall --

12 MR. PARKER: I think Mr. Garmansky ought to
13 continue reading.

14 THE COURT: Read the rest of it.

15 Q "Q You don't recall anybody?

16 "A Not about the plan per se. There were some
17 comments about the proxy, some of the language in the proxy.

18 "Q We are not dealing with the proxy, just the
19 plan of merger with new company."

20 MR. PARKER: It does not have a question
21 mark on it.

22 Q "A No.

23 "Q Anybody have any questions about that merger?

24 "A Not at all."

25 Do you recall those questions and do you recall

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2 giving those answers?

3 A No, sir.

4 Q If you were asked those same questions today,
5 would your answer be the same?

6 MR. PARKER: If Mr. Garmansky is offering this
7 in relation to the testimony previously given by the
8 witness, I respectfully submit, your Honor, there isn't
9 necessarily a relationship between the two, or there is
10 a misunderstanding as to the language that is used in both
11 the answer given by the witness --

12 THE COURT: Now that you have instructed your
13 client what to answer, sit down.

14 Go ahead and answer the question.

15 Q If you were asked those questions today,
16 would your answers be the same?

17 A Not after you have refreshed my memory with
18 looking at the minutes of the meeting, because the minutes
19 do state I made some comments which I probably did not
20 remember when you asked me then.

21 Q Mr. Somekh, at the time of this transcript,
22 those two minutes were marked in prior to these questions
23 being asked and you identified them.

24 MR. PARKER: Objection. This is arguing with
25 the witness.

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THE COURT: Let's hear what the question is going to be.

Q Do you recall that happening?

A No, sir.

MR. GARMANSKY: Then we will go back in the transcript and show Mr. Somekh where he saw those minutes.

Q Look on page 211, Mr. Somekh. I will read for you beginning on line 2:

"MR. GARMANSKY: I would like to mark as Division Exhibit 8 minutes of the board of directors meeting of July 26, 1974, five pages.

"Q Do you recognize Exhibit 8 for identification?

A Yes."

Mr. Somekh, what has been marked as Plaintiff's Exhibit 21 is also marked Division Exhibit Somekh 8.

Does that refresh your recollection that you saw this document prior to answering the questions I just read to you?

A Does that mean I read it?

MR. PARKER: I have an objection and I will not speak to it unless your Honor permits me to do so.

THE COURT: Go ahead.

MR. PARKER: In the first place, Mr. Garmansky

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1 is going twenty pages ahead in the record and attempting
2 to try to tie the two things up without the intervening
3 testimony that was given.
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5 Secondly, he is now examining about a meeting,
6 as I understand it, and I may be mistaken about it, about
7 Exhibit 22 which was a meeting of August 29, 1974, and he now
8 inquires of the witness in respect of Plaintiff's Exhibit 21
9 which was a meeting of July 1974, and I just don't think
10 there is any rationality to the interrogation going on
11 or that this witness or anybody else can possibly under-
12 stand what the interrogator is after.

13 MR. GARMANSKY: Your Honor, Mr. Somekh has
14 answered when I asked him on use of the transcript for
15 impeachment purposes, "Do you recall those questions and
16 answers?", and he answered he did not.

17 I think asked him, "If you were asked those
18 questions today, would your answers be the same?", and
19 his response was no because his recollection was refreshed
20 by Division Exhibits 21 and 22, the minutes.

21 I am now trying to show Mr. Somekh before
22 those questions were asked in the transcript, those two
23 exhibits were marked in and they were shown to him, and he
24 identified them, he recognized them.

25 Therefore, it is incredible that the witness

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can state here today --

THE COURT: Please.

Did you have a chance to read those documents?

THE WITNESS: At that time, no, I did not.

THE COURT: Go ahead.

Q Mr. Somekh, did you recognize those documents
at the time?

A Mr. Garmansky, typewritten papers are typewritten
papers. I see loads of them.

I don't know that they have any red flag on
them that would make me recognize them as something special.

MR. GARMANSKY: I would like the witness'
remarks stricken from the record.

THE COURT: No.

(Continued on next page)

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2 Q Mr. Somekh, did you recognize those documents
3 at the time?

4 A No, sir, not any more than I recognize them now.
5 Unless you told me what they are, I wouldn't know what
6 they are.

7 Q I direct your attention to page 211, line 8:

8 "Q Do you recognize Exhibit 8 for identification?

9 "A Yes."

10 A You showed me something which I recognized as
11 something at that particular time. Does that mean I should
12 have a picture of it since that time until now? I don't
13 know what I am expected to know here.

14 THE COURT: Hold on for just a second.

15 Mr. Somekh, go outside and stand in the hallway.

16 (Witness leaves room.)

17 THE COURT: Any other witnesses in here?

18 MR. GARMANSKY: No, your Honor.

19 THE COURT: Tell me where all of this is going if
20 any place.

21 MR. GARMANSKY: Would you like me to answer?

22 THE COURT: I am asking for an offer of proof.

23 MR. GARMANSKY: The testimony you had previously
24 from the witness indicates that there were no discussions
25 of the reasons for going private by the witness or any

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2 other board member. There was no discussion of anything.

3 I would then like to ask the witness if that is
4 so, how did the reasons become, or how did they show up
5 in the proxy statement, who discussed them, were those
6 accurate reasons.

7 THE COURT: What does this have to do with
8 whether he saw the minutes at some investigation that
9 you conducted?

10 MR. GARMANSKY: It was the witness' answer, your
11 Honor, when I tried to impeach him, that his answer would
12 not be the same because he did not have the opportunity
13 to examine those documents but the witness was wrong be-
14 cause they were marked into the record prior to the
15 question.

16 THE COURT: That doesn't mean a thing.

17 MR. GARMANSKY: He did examine it because I
18 have 20 pages where there were quotes from these docu-
19 ments. These documents were in front of him, your Honor.
20 I am saying his answer is incredible.

21 MR. PARKER: I object to that kind of a comment.

22 THE COURT: Don't be silly. It's argument of
23 advocacy.

24 MR. GARMANSKY: I am showing the witness to be
25 utterly incredible for any statements that flow from his

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2 mouth. I am also showing that going private was a mere
3 rubber stamp by Mr. Somekh imposed upon the whole board
4 and the whole company. It was at his will, his bidding,
5 his insistence to go private. Nothing more, nothing
6 less.

7 MR. PARKER: May I be heard?

8 THE COURT: Yes.

9 MR. PARKER: If your Honor please, I sharply
10 differ with Mr. Garmansky's characterization and this is
11 with the greatest respect, your Honor. I think the Com-
12 mission had an entirely different idea when it started
13 this investigation than when it brought this lawsuit. I
14 don't think I am speaking out of turn, your Honor, when
15 I suggest that at the time the investigation was started
16 almost a year and a half ago or more, that the Commission
17 was then addressing itself to a question whether there
18 was a violation to be found in the fact that a company
19 that had been public went private.

20 The entire investigation, at least to the extent
21 that we were privy to it and we were certainly not privy
22 to very much of it because there was much more apparently
23 that went on. It appeared that that was the thrust and
24 that was the purport and that was the purpose of the
25 investigation that had been conducted.

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2 THE COURT: It happens all the time.

3 PARKER: I understand that, your Honor, and
4 we now find ourselves in the position with an action hav-
5 ing been brought and having to accept at face value or
6 more the gravamen of the complaint which the Commission is
7 now asserting and that differs, your Honor, it seems to
8 me, from the nature of the investigation that went on.
9 It differs from what was adduced during the course of the
10 investigation and that is apparent from the complaint be-
11 cause what happened, your Honor, is this: For some reason
12 unknown to me, the Commission in its wisdom decided that
13 what it would not challenge here, because if it has, it's
14 certainly not apparent; what it would not challenge here
15 is the legality of the act of going private and instead
16 if your Honor please, and this is all embodied in para-
17 graph 19 of the complaint, it decided to question whether
18 there were certain statements in the proxy material that
19 had been issued which were objectionable.

20 We have been here well over a day, your Honor,
21 and those statements which are challenged in the complaint
22 haven't even been approached.

23 THE COURT: Wait a second. I don't know about
24 you. I know that your argument is all immaterial, irrele-
25 vant, incompetent but I will tell you right now, I see

lots of relevance coming out.

MR. PARKER: You will give us an opportunity to argue the point, of course?

THE COURT: Certainly.

MR. PARKER: But the point is, your Honor, I don't know whether there has been occasion to observe -- there is one document that objection was not taken to as far as relevancy is concerned because as we understood it, the challenge was to the proxy statement which has been marked Plaintiff's Exhibit 1.

We are here trying a case without even the rudiments of notice called for by the federal rules. This is not the case they told us they were going to try. This is a different case.

THE COURT: Wait a second.

Did you read the complaint?

MR. PARKER: Yes.

THE COURT: You read their memorandum?

MR. PARKER: Yes.

THE COURT: You have notice. And you also got an extra week or so.

MR. PARKER: Your Honor, I haven't concluded my remarks.

THE COURT: Say what you please.

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2 MR. PARKER: What I am suggesting here is, the
3 issue that has been raised in the complaint is whether
4 there was a material non-disclosure in what the Commission
5 characterized as a failure to disclose that there was a
6 personal benefit to be realized by Mr. Somekh by going
7 private, after the fact whether that would result in a
8 benefit to Mr. Somekh.

9 Secondly, they go on to say and this is the
10 second part of their complaint, they go on to say in the
11 course of certain negotiations with the Federal Reserve
12 Board, there should have been disclosed the fact that there
13 were negotiations going on and that is contrary to what
14 is disclosed in the proxy statement.

15 The third point is, that two appraisers or two
16 appraisals that had been obtained prior to going private,
17 that in the course of those there had not been, and the
18 words of the complaint are, the appraisers had not been
19 provided with sufficient information.

20 Now, those are the three elements it seems to me
21 that we have at issue here and it seems to me, and I respect-
22 fully submit this and I would certainly appreciate an oppor-
23 tunity to argue it more fully at an appropriate time, it
24 seems to me what has been going on here is an inquiry into
25 the question whether the company did go private, the

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2 circumstances under which it went private and whether the
3 fact that it went private was objectionable, rather than
4 the question whether the proxy statement contains state-
5 ments which were objectionable or failed to include
6 statements and therefore is objectionable.

7 THE COURT: Does the proxy statement say that the
8 person who ends up in control of the private corporation
9 is going to use the private corporation's funds to pay
10 off his debts?

11 MR. PARKER: This is argument. This is a ques-
12 tion of law.

13 THE COURT: Does it say it?

14 MR. PARKER: We contend it does.

15 THE COURT: Does it say it in those words?

16 MR. PARKER: In those precise words, I cannot
17 say that, but I will say to you that the substance of it
18 is certainly there and any reasonable person would have
19 realized it and could not miss it.

20 THE COURT: I read it, counselor, and I read
21 the part that you quoted. I will tell you, I could have
22 missed it and I assure you she would have missed it.

23 Let's get away from the continued impeachment
24 on minor matters and let's get into the meat of this thing.

25 Go get the witness.

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Somekh - direct

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(Witness resumes stand.)

MR. PARKER: May I add just one thought?

THE COURT: Yes.

MR. PARKER: That is, I was attempting to address myself to the point that your Honor had raised and should not be understood to concede that this matter we had under discussion is any kind of a concession that this was done for the purpose that your Honor indicated or questioned me about.

THE COURT: Don't be silly. This is no judicious admission. Don't worry about it. It's merely a discussion among lawyers, if I still can be included as a lawyer.

Go ahead.

BY MR. GARMANSKY:

Q Mr. Somekh, the July 26th board meeting of Parklane, isn't it a fact that you felt the price was a fair price of the Parklane stock at that time, that it was worth between a dollar and a half and \$2 a share?

A I mentioned that figure without the knowledge that appraisers should be used, et cetera.

Q Did you have any basis?

A Yes.

THE COURT: I didn't understand the answer.

Read it back, please

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Somekh - direct

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(Record read.)

Q Did Parklane subsequently retain appraisers?

A Yes. I was informed --

Q Thank you.

Do you recall when you retained Thomson, McKinnon, Auchincloss to do the appraisal of Parklane?

A There was a meeting with them I think the first week in August which was subsequent to our July board meeting at which time they suggested that they would study the matter and come back to us on whether they would do the appraisal or not and subsequently about two or three days later came back and indicated they would do it.

(Continued on next page.)

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1 rkjb
2 Q When for the first time did you find out what
3 the results of Thomson, McKinnon's appraisal report would
4 be?

5 A I think it was at a meeting at Kaye, Scholer
6 somewhere around the end of August or the latter part of
7 August.

8 Q Was it prior to the August 29, 1974 board meeting,
9 that is, Plaintiff's Exhibit 22?

10 A Pardon?

11 Q Was it prior to Plaintiff's Exhibit 22, the
12 August 29, 1974 board meeting?

13 A Yes.

14 Q Who was present at Kaye, Scholer?

15 A There was Stanley Robinson, Jack Friedman, a
16 fellow by the name of Lubasch. There was Nate Lubow, Sol
17 Silverman, a couple of fellows from Thomson, McKinnon.
18 There was Mr. Rubinstein of Foster Securities and I
19 think the lawyers for Thomson, McKinnon.

20 Q Do you know the people from Thomson, McKinnon?

21 A No, I really don't remember.

22 Q Do you recall Mr. Peter Russ?

23 A I know the name but I wouldn't know him if I saw
24 him.

25 Q You don't know whether or not he was present at

that meeting at Kaye, Scholer which you just described?

A I know there were a couple of fellows from there.

Q Do you know who signed the appraisal report from Thomson, McKinnon?

A No.

Q Do you know Mr. Roger Cortisi?

A Yes.

Q Was he present at the Kaye, Scholer offices?

A No.

Q He was not?

A No.

Q Did Thomson, McKinnon give you the results of their appraisal?

A The meeting was called, really, for all of these people --

Q Mr. Somekh, can I have a yes or no? Did they give you the results of their appraisal?

A No, they didn't give me the results at that particular time. I think they had some findings but there was nothing in black and white that they gave me.

THE COURT: Did they tell you about it?

THE WITNESS: Yes.

Q What did they tell you?

A Thomson, McKinnon I think came with a range of

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2 \$1.75 and Foster Securities came with a range of about
3 \$1.35.

4 Q And you and Mr. Robinson were the only two board
5 members present at that meeting?

6 A I think so.

7 Q How many members of the board were there at
8 that time?

9 A Five or four.

10 Q Is it a fact that the other board members were
11 Mr. Charles Yaffe, Mr. Persky and Mr. David?

12 A I don't know that Mr. Persky was a board member
13 at that particular time. I think he was elected at a
14 meeting of the board subsequent to that date.

15 Mr. David who is at Mobil, probably couldn't,
16 but there was not a board meeting at all.

17 Q I am not saying it was. I am saying those were
18 the other individuals on the board of directors?

19 A Yes.

20 Q At the August 29, 1974 board meeting were members
21 of Thomson, McKinnon present?

22 A No.

23 Q Were representatives of Foster Securities present?

24 A No, sir.

25 Q Did you have the physical appraisal report of

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2 Thomson, McKinnon at the August 29, 1974 board meeting?

3 A I think their attorneys had it. I didn't have
4 it in my possession.

5 Q Did the board have it?

6 A They may have. I am fairly certain they did
7 but I cannot really say with finality.

8 Q Did you see it at the board meeting, the Thomson,
9 McKinnon appraisal report, the final report?

10 A I don't recall seeing it.

11 Q Do you recall seeing the Foster Securities
12 appraisal report at the board meeting of August 29, 1974?

13 A No, sir.

14 Q Who was present, Mr. Somakh, at the August 29,
15 1974 meeting to answer questions concerning the valuation
16 of the Parklane stock?

17 A I suppose Stanley Robinson who was present at
18 the meeting before and Nate Lubow who was present at the
19 meeting before. Mr. Lubasch who was present at the meet-
20 ing before and so was I.

21 Q And Mr. Robinson is an attorney?

22 A Yes, sir.

23 Q Would you consider him an expert in securities
24 appraisal?

25 MR. PARKER: Objection.

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2 THE COURT: I don't know what an expert in securi-
3 ties appraising is. Go ahead.

4 A Mr. Stanley Robinson is not.

5 Q Would you consider Mr. Lubasch?

6 MR. PARKER: Same objection.

7 THE COURT: I will let it go.

8 A No.

9 Q Would you consider Mr. Lubow an expert?

10 A He may be a little more expert than the rest of
11 us.

12 Q Did any of the board members ask any questions
13 concerning the valuation of the stock, how it was arrived
14 at, any questions at all?

15 A Yes.

16 May I explain a little, Mr. Garmansky?

17 THE COURT: Go ahead.

18 A The meeting of August 29th was sort of drawn
19 out because Mr. Robinson was in Toronto and we had to
20 wait for his arrival which was about 9:30. Everybody
21 else was there ahead so there was a lot of informal dis-
22 cussion prior to the meeting when Stanley came in. We
23 had to wait for Stanley. We had to wait for him to have
24 dinner and then we went back to my office at around 10:30
25 or 11:00 for the meeting.

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Somekh - direct

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THE COURT: That is not the answer to the question.
What was the discussion about the valuation?

THE WITNESS: The discussion prior to the office
meeting?

THE COURT: Either way, prior or after.

THE WITNESS: There was a lot of discussion
between Nate and Lubasch as to what Thomson, McKinnon came
up with, what Foster Securities came up with, what ques-
tions they were asked at the meeting at Kaye, Scholer,
what questions were raised to test the validity of their
appraisal and that was discussed I think around with the
rest of the people.

Q Do you recall, Mr. Somekh, Mr. Yaffe, Mr. Persky
and Mr. David asking questions?

A Yes, sir.

Q You do recall that?

A Yes, prior to dinner at Pete Luger's.

Q Do you know what the PE ratio is?

A Price earnings ratio.

(Continued on next page.)

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Somekh-direct

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Q Do you know what it is?

A Yes, I just learned that in school.

Q You just learned it?

A I think I understand it better now that I had it in school.

Q How was your understanding in August of 1974?

MR. PARKER: Objection.

MR. GARMANSKY: Question withdrawn.

Q Mr. Somekh, at the time of the board meetings, July 26, 1974 and August 29, 1974, did you disclose to the board your personal financial condition with respect to your outstanding personal loans?

MR. PARKER: Objection.

THE COURT: I will let him answer.

A No, sir.

Q Do you know whether or not any of the board members knew of your outstanding personal loans?

A No, sir.

THE COURT: "No, sir," you don't know or "No, sir," you don't remember?

THE WITNESS: I don't know.

Q Did you tell the board on both those occasions, July 26, 1974 and August 29, 1974, that one bank was threatening you with legal action unless you paid?

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2 rkmch

Somekh-direct

A I don't see that that was any business of anybody but minue.

Q Please answer the question.

A No, I did not.

Q Did you disclose to the board on both those occasions that one of your reasons for going private was to pay off your bank loans?

MR. PARKER: Objection.

A How can I disclose something that wasn't so?

THE COURT: Did you say that?

THE WITNESS: No, sir.

Q Mr. Somekh, I show you Plaintiff's Exhibit 1 in evidence.

Would you please turn to page 5 -- I'm sorry, page 3.

Would you read out loud the next to the last paragraph?

A "If the proposed merger is consummated, the shareholders of Newco would be entitled to the benefit of all the assets, earnings, earning capacity and cash flow of the company. The merger will make possible a combination of the resources of the company with those of Mr. Somekh (who with his wife and trusts for the benefit of his children owns approximately 86 percent

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1 3 rkmch

Somekh-direct

2 of the stock of Newco) for the conduct of real estate
3 activities of the type that Mr. Somekh has to date
4 conducted individually (primarily development of garden
5 apartments). Such a combination is presently being
6 contemplated."

7 Q What you have just read, was that a reason of
8 yours to go private?

9 A Yes, sir.

10 Q You are certain of that?

11 A No. It's one of the reasons. There were
12 many, many reasons.

13 Q I am not asking you many reasons.

14 Was it a reason for you to go private?

15 A It's one of many reasons, Mr. Garmansky.

16 Q You are certain of that?

17 A Yes, sir.

18 Q I show you what has been marked Plaintiff's
19 Exhibit 16 for identification.

20 Would you please turn to page 11? The bottom
21 of page 10, beginning on line 21.

22 "Q Let me show you the paragraph. Let me read
23 it to you."

24 There follows from line 23 of page 10 to line 11
25 of page 12 what you have just read into the record, sir.

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Somekh-direct

Beginning on line 12:

"Mr. Somekh, that particular paragraph, is that one of the reasons for Parklane going private?

"A It so states in the proxy.

"Q It doesn't state, sir, that is one of the reasons in the proxy. That is why I am asking you the question.

"A Well, that is a result of the merger and if the merger does occur that such activities are contemplated.

"Q Is that a reason for Parklane going private?

"A No."

Do you recall those questions and do you recall giving those answers?

A No, sir.

Q If you were asked those same questions today, would your answers be the same?

A I suppose it would have to be one of many reasons.

Q Answer yes or no.

A To say that that is a specific reason for me to go private, no.

MR. GARMANSKY: I wish that would be stricken from the record.

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1 5 rkmch

Somekh-direct

2 THE COURT: No.

3 MR. GARMANSKY: I never said --

4 THE COURT: I heard it.

5 MR. GARMANSKY: I am just afraid of it
6 confusing the record.

7 THE COURT: Well, you are doing a great job
8 on it.

9 Let's take a break.

10 (Recess)

11 (Continued on next page)

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Somekh-direct

(In open court)

THE COURT: Continue, Mr. Garmansky.

DIRECT EXAMINATION CONTINUED

BY MR. GARMANSKY:

Q Mr. Somekh, isn't it a fact that a reason
your decision to bring Parklane back to the status of
a private company was to aid you in paying off your bank
loans?

A No, sir.

Q Mr. Somekh, do you recall a meeting in or
about August of 1974 with Mr. Baggott?

A Yes.

Q And do you recall the specific date?

A No.

Q Was this prior to the August 29, 1974 Parklane
board meeting?

A It may very well have been.

Q Is that your best recollection?

A Probably. I am not sure, but I know I had
met Baggott about that time.

THE COURT: Keep your voice up.

Q Would you tell me who was present at that
meeting?

A I don't know if we are talking about the same

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1 2 rkmch

Somekh-direct

2 meeting.

3 Q I am talking about the one you recollect.

4 A If I did have in fact one in August, it would
5 have been Nate Lubow, Tom, probably his assistant, and
6 myself.

7 Q Where was this meeting held?

8 A I really don't know. It could have been in
9 his office; it could have been at the Weavers Club.

10 Q You have no recollection?

11 A Not specifically.

12 Q Do you have a general recollection where it
13 was held?

14 A Usually I would come into the city and we would
15 go out to the Weavers Club for lunch. That is where most
16 of the time -- where it would be most of the time.

17 Q Would you please tell me what was discussed
18 and by who?

19 A I don't really know what was discussed.
20 Probably --

21 Q Do you have a recollection of what was
22 discussed?

23 A Generally probably it was to bring him up to
24 date on what we were doing, because he would have had to know
25 anyway, and just to sort of bring him up to date on what

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1 3 rkmch

Somekh-direct

2 was going on.

3 Q Do you recall any discussions concerning your
4 personal loan at Bankers Trust?

5 A I don't think there was any real emphasis.
6 It may have been mentioned.

7 Q Do you recall any discussions; yes or no, sir?

8 A Not specifically, no.

9 Q What do you recall?

10 A As I said, it probably was an update of what
11 was going on, what was being done, and so on.

12 Q An update of what?

13 A Of the events that were taking place.

14 Q What were the events?

15 A We were going private. We had appraisals
16 going. We had all kinds of things going.

17 Q Just your personal loans?

18 A I don't think I discussed my personal loan with
19 him much.

20 Q Did you discuss it at all?

21 A No.

22 Probably one of the things that came up was
23 that the Rite-Aid mortgage wasn't closed then, and he
24 said why wasn't it closed, and I said because they lost the
25 note.

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1 4 rkmch

Somekh-direct

2 THE COURT: They lost the note?

3 THE WITNESS: Yes.

4 THE COURT: Who lost it?

5 THE WITNESS: The bank.

6 Q Bankers Trust lost the note?

7 A That is right, and it took us from April
8 until December to convince the other party to do the trans-
9 action, Rite-Aid to substitute, to give us a substitute
10 note, to cancel the old note and substitute the new note
11 for it, and we had a real rough time with them.

12 Q Do you recall anything else being discussed
13 about your personal loan?

14 A Not in any specific detail.

15 Q Again, do you remember anything generally?

16 A No, not much.

17 Q Isn't it a fact that at that meeting in
18 August 1974 you told Mr. Baggott your plans to go private?

19 A Mr. Garmansky --

20 Q Yes or no, Mr. Somekh?

21 A I told him we were going private. Of course
22 I told him we were going private.

23 Q Then your answer is yes?

24 A Yes, sir.

25 Q Isn't it also a fact at that meeting you told

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Somekh-direct

2 Mr. Baggott that one of the reasons for going private
3 was in order to pay off your personal loan; yes or no?

4 A No.

5 Q Isn't it also a fact, Mr. Somekh, at that
6 meeting you told Mr. Baggott you were going to sell some of
7 your personal assets to the company after it became
8 private; yes or no?

9 A I suggested --

10 Q Yes or no?

11 A I am sorry, sir.

12 THE COURT: Can you answer it yes or no?

13 THE WITNESS: It's not a yes or no answer.

14 THE COURT: All right. He can't answer it

15 yes or no.

16 A It's yes and no.

17 Q Yes, you did tell him and no, you did not
18 tell him?

19 A Right, because it just isn't black and white.

20 Q Isn't it also a fact, sir, you told Mr.
21 Baggott when the company becomes private, that you would
22 then be able to pay off your personal loan because of the
23 sale of your assets to the company? Yes or no?

24 A If as a consequence of having gone private
25 I would sell my assets to Parklane, then I certainly would

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Somekh-direct

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2 give the notes to Mr. Baggott. I am sure that is what
3 I would have told him.

4 Q Do you recall doing so?

5 A No, but if you say these are all facts, then
6 that is what I would have said.

7 Q Do you agree or disagree?

8 A I don't agree or disagree. I am saying
9 if what you are telling me was a sequence of events,
10 and if this kind of conversation took place, I am suggesting
11 what I may have said.

12 Q Let me show you what has been marked Plaintiff's
13 Exhibit 12 for identification.

14 Please read that to yourself and see if that
15 refreshes your recollection of the August 1974 meeting.

16 A That is Mr. Baggott's memorandum to himself.

17 Q I understand.

18 Please read it and see if it refreshes your
19 recollection as to what might have occurred at that
20 meeting.

21 A All right.

22 (Pause)

23 A What it does tell me --

24 THE COURT: The question is does it refresh
25 your recollection?

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1 7 rkmch

Somekh-direct

2 Q Does it?

3 A Somewhat.

4 Q In what portions does it refresh your recol-
5 lection?

6 A It just tells me that Mr. Baggott really
7 remembered what he wanted or liked to remember.

8 MR. GARMANSKY: Your Honor, I hate to impose
9 upon the Court.

10 THE COURT: Please, that is not the answer.
11 What do you recall from that meeting?

12 THE WITNESS: The result of the meeting was
13 that we were getting appraisals, that we really didn't
14 know what the appraisals would be, that if as a consequence
15 of having gone private I may take the approach to sell some
16 of my properties, and I didn't know which ones then, sir,
17 to Parklane, and at that time, whether I would give
18 him the notes that I would take from Parklane or do
19 whatever I may want to do at that particular time, or I
20 may sell other properties.

21 Q Mr. Somekh, is it not a fact, then, at the
22 time of this August 1974 meeting with Mr. Baggott,
23 you were contemplating to pay off your bank debts by
24 selling assets to Parklane after it became a private
25 company?

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1 8 rkmch

Somekh-direct

2 A Not particularly to Parklane. I would sell
3 it to anybody else if I so choose or if I thought I could
4 make a better deal.

5 Q Then you were contemplating to reducing your
6 loan by the sale of assets to Parklane or other entities
7 or individuals?

8 MR. PARKER: Objection as to form.

9 THE COURT: I will permit it.

10 A The only --

11 Q Yes or no, sir.

12 A Yes or no to what?

13 THE COURT: Were you contemplating through the
14 sale of your assets reducing your personal loan?

15 THE WITNESS: Yes, sir.

16 Q Mr. Somekh, do you recall a meeting with Mr.
17 Baggott in or around -- on or about September 5, 1974?

18 A I think there was a meeting generally at that
19 time.

20 Q Where was the meeting held?

21 A I don't know, sir.

22 Q Who was present?

23 A Most likely Mr. Baggott, his assistant, Mr.
24 Lubow and myself.

25 Q Is that your best recollection?

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Somekh-direct

2 A That would be the normal thing. I do not
3 really remember the meeting specifically.

4 (Continued on next page)

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2 Q I didn't ask you that. I asked you if that is
3 your best recollection as to who was present.

4 A I would say so.

5 Q Would you please tell me what was discussed and
6 by whom at that meeting on or about September 15th?

7 A By then we have gotten an appraisal and I think
8 we had our proxy and we laid out really the method by
9 which we were doing it. I think there was some discussion
10 as to how the stockholders would get paid and we said they
11 will get paid as they turn in the shares.

12 Mr. Lubow commented probably the first 60, 70
13 per cent will come in the first couple of weeks and it
14 will be a while before the balance comes in, so that
15 probably would make it easier to pay them out; that we
16 were thinking about what we may be doing after going
17 private; that I may -- at that time really there was a
18 mortgage being closed in Tulsa that I would be reducing
19 \$2,300,000 to Bankers Trust over there; that the property
20 was coming along pretty well and that I have not really
21 finally decided what I wanted to do completely, but that
22 we would begin to attempt to work out something in terms
23 of paying him off somewhat down.

24 Q When you make reference to paying down, do you
25 mean your personal loan, sir?

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1 A Either one. He had his choice.

2 Q What was the other one?

3 A Either Parklane or myself, whatever he wanted
4 we would do.

5 Q Do you recall discussions about your personal
6 loan at the meeting?

7 A Again, we had the two loans --

8 Q Yes or no; do you recall discussions about your
9 personal loan?

10 A There were discussions about both loans at the
11 same time. The question was what did Mr. Baggott like us
12 to do or what he would prefer and we would do what he would
13 prefer.

14 Q I didn't ask you that.

15 THE COURT: Stop arguing.

16 Q Do you recal discussions, Mr. Somekh, about
17 your personal loan at that meeting?

18 THE COURT: He already answered it. Get on to
19 something else.

20 Q Isn't it a fact, Mr. Somekh, you told Mr.
21 Baggott you were going to go private in order to pay off
22 the personal loan at Bankers Trust?

23 A That is not so and if it's a fact you don't have
24 to ask me.

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rkjb

Somekh - direct

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Q Isn't it a fact you --

A Not a fact --

THE COURT: Wait. Hold on. A little less heat and a little more light. Answer the questions.

A It's not a fact.

THE COURT: Next question.

MR. GARMANSKY: I am trying to get the question out.

Q Mr. Somekh, is it not a fact that you told Mr. Baggott that you were going to sell some of your personal assets to to company getting back cash in notes and assigning the notes to Bankers Trust in reduction of your loan after Parklane went private?

A If I chose to do so at that particular time. If that was the method I was using to use to sell property.

Q So you were contemplating that method on or around September 15, 1974?

A I would say so, sir.

Q Isn't it a fact that is what you did exactly to reduce your personal loan at Bankers Trust?

A That is what I did because it best suited me.

Q Yes or no, sir?

A Yes, sir.

Q Now, Mr. Somekh, at around this period of time

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2 September 15, 1974, were you looking for any buyers for
3 your properties?

4 A Yes.

5 Q Did you have any of your properties listed with
6 any brokerage firms?

7 A Yes. As a matter of fact, there was an offer
8 from Hale Mills in Houston to buy 20 acres in Tulsa for
9 20 million.

10 Q Did any of these offers materialize?

11 A I turned it down.

12 Q At this September meeting with Mr. Baggott that
13 you just testified to, isn't it a fact you told Mr. Baggott
14 you would be able to make a monthly reduction on your
15 loan of approximately \$25,000?

16 A I suggested that that is what we may do.

17 Q Do you recall discussing that with Mr. Baggott
18 about a \$25,000 monthly reduction?

19 A I really don't but I suggested if that is what
20 he would like, that is what we would do.

21 Q Mr. Somekh, what was your salary as president
22 of Parklane Hosiery prior to August 30, 1974?

23 A \$90,000, sir.

24 Q \$90,000 a year?

25 A Yes.

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rkjb

Somekh - direct

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Q Isn't it a fact it was only \$60,000 a year?

A No, it's not a fact it was only \$60,000 a year.

Q \$90,000?

A That is right.

THE COURT: Are you referring to income or salary?

THE WITNESS: Salary.

Q Does that include bonuses?

A I don't know but as of August 1st --

Q 1974?

A 1974 -- my salary was raised to \$90,000.

Q Was there a board meeting held in which that was accomplished?

A Yes. It was discussed with the board members prior to the July 26th meeting.

Q Do you recall what board meeting it was adopted that your salary would be \$90,000 per annum?

A It should have been adopted at that time. I really don't know.

Q What time?

A Sometime in July because I discussed it with Allen Kesbaum at Kaye, Scholer. I discussed it with David. I discussed it with --

THE COURT: David who?

THE WITNESS: David David is a member of our

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2 board.

3 Q How many board meetings do you recall being held
4 at Parklane in July of 1974?

5 A Only one.

6 Q I show you Defense Exhibit 21 in evidence. Is
7 there anything in that statement stating or explaining an
8 increase of salary to you of \$90,000?

9 A If it wasn't there, then it was overlooked, sir.

10 THE COURT: Let me look at it.

11 Q Mr. Somekh, is there an executive committee of
12 Parklane?

13 A Yes.

14 Q Was there an executive committee in or around
15 September of 1974?

16 A Yes.

17 Q Who was on the executive committee in or around
18 September of 1974?

19 A Charles Yaffe, Neal Persky and myself.

20 Q Do you recall any meetings of the executive com-
21 mittee at Parklane on or about September 16, 1974?

22 A Yes, sir. Not really in specific terms, but we
23 meet constantly, so I had to see them September 15th,
24 September 16th, September 17th. I would see them every
25 day.

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Q So you are holding executive committee meetings every day?

A We meet usually every day. We would probably have lunch together most every day. We would meet together sometimes during the day.

Q Were your discussions written up in the form of minutes?

A I really don't know, sir.

Q Did you ever see any minutes of the executive committee ever at any time?

A It's very seldom I have ever seen board meetings.

Q I didn't ask you that.

THE COURT: Did you see any executive committee meetings?

THE WITNESS: No.

Q Is it not a fact on or about September 16, 1974, you attended an executive committee meeting of Parklane in which your salary was increased to \$150,000 retroactively?

A Yes, sir.

Q And also for the upcoming fiscal year?

A Yes, sir.

Q Mr. Somekh, I show you Plaintiff's Exhibit 1 in evidence, the proxy statement of Parklane. It's dated

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2 on or about September 24, 1974. Is there anything in
3 that proxy statement disclosing your increase of salary
4 to \$150,000 to the past fiscal year and for the upcoming
5 fiscal year?

6 A No, because I don't think it is. I don't re-
7 member seeing it in there.

8 MR. GARMANSKY: I would like to mark this as
9 Plaintiff's Exhibit 23.

10 (Plaintiff's Exhibit 23 marked for identifica-
11 tion.)

12 Q Can you identify Plaintiff's Exhibit 23?

13 A No, sir, I cannot identify it.

14 Q Have you ever seen a copy of that document prior
15 to today?

16 MR. PARKER: May we have a copy of that document?

17 A No.

18 (Continued on next page.)
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2 Q Do you recognize the signature in the bottom of
3 Plaintiff's Exhibit 23?

4 A That is Charlie's signature.

5 Q Charlie who?

6 A Charlie Varfe.

7 Q He is a member of the board of directors?

8 A Yes.

9 MR. GARMANSKY: I offer Plaintiff's Exhibit 23 in
10 evidence.

11 THE COURT: Have you had a chance to read it?

12 MR. PARKER: Just one moment, your Honor.

13 THE COURT: Read it.

14 (Pause.)

15 MR. PARKER: No objection.

16 (Plaintiff's Exhibit 23 received in evidence.)

17 Q Mr. Somekh, did you state to the executive com-
18 mittee when you met on or about September 16th your reasons
19 for your increase in salary?

20 A I think so.

21 Q What were those reasons, sir?

22 A I felt that since Monty left and nobody replaced
23 him --

24 Q Who?

25 A Charles F. Milner, our executive vice president

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Somekh - direct

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who was getting \$60,000 a year left and I didn't replace him, I took on most of his duties. In addition, really, in looking around I found that I am one of the lower paid executives of the size company I was running and I thought it was time that I was actively compensated.

Q When did Mr. Milner leave?

A The end of July. He announced his resignation on July 26th.

Q When did he physically leave?

A August.

Q The end of August, is that not correct?

A Right.

Q You were awarded this increase of salary on or about September 16th, approximately three weeks later?

A Right.

Q And you were awarded the salary retroactively for the entire year?

A They thought they should make it for the entire year.

Q You didn't question it, sir?

A No.

Q You are saying Mr. Persky and Mr. Yaffe gratuitously gave you the entire year?

A Yes, sir.

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Somekh - direct

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2 Q Mr. Somekh, you testified that you were sued by
3 First National City Bank for non-payment of your loan, is
4 that correct?

5 A You said that, I didn't.

6 Q Is it correct, sir?

7 A I really don't know.

8 Q You don't recall testifying this morning that
9 you in fact were sued by First National City Bank?

10 A No. You showed me a letter and you said in this
11 letter they state they were going to sue me and I said
12 if that is what they were going to do, that is what they
13 were going to do.

14 Q Mr. Somekh, do you recall being sued by First
15 National City Bank in or around the fall of 1974 for non-
16 payment of your loan?

17 A If I did, they must have served me and I must
18 have sent the papers to Kaye, Scholer.

19 Q Do you recall, sir?

20 A No.

21 MR. GARMANSKY: I would like to mark this as
22 Plaintiff's Exhibit 24.

23 (Plaintiff's Exhibit 24 marked for identifica-
24 tion.)

25 MR. GARMANSKY: And this exhibit as Plaintiff's

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Somekh - direct

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Exhibit 25.

(Plaintiff's Exhibit 25 marked for identification.)

Q Mr. Somekh, do you recognize Plaintiff's Exhibit 24 marked for identification?

A No, I cannot.

Q You do not recall being served with Plaintiff's Exhibit 24 on or around the beginning of October, 1974?

A No. It may have come to the office and Ann, my secretary, may have said I got this and I would have said send it to Kaye, Scholer but I don't remember it.

Q Plaintiff's Exhibit 24 does not refresh your recollection that you were sued by First National City Bank for non-payment of your loan?

A If it says so --

Q Yes or no?

A No, it does not.

Q Do you recognize Plaintiff's Exhibit 25?

A No, I really don't.

Q Does your signature appear on the second page of Plaintiff's Exhibit 25?

A Yes, but I don't remember the papers at all, really. It must have been something that Kaye, Scholer asked me to sign and I signed it.

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2 Q Isn't it a fact, sir, you entered into a settle-
3 ment with First National City Bank to repay them the sum
4 of \$4,000 per month?

5 A That is exactly what Kaye, Scholer did. I wasn't
6 present at all, really.

7 Q Who entered into the settlement, you or Kaye,
8 Scholer?

9 A One of the banking department guys at Kaye,
10 Scholer got this. He said what should we do and I said
11 do whatever you want to do and they came back and said
12 that is what we did and I said fine.

13 Q So you recall entering into such a settlement?

14 A I really don't recall.

15 THE COURT: Did you understand you had an obliga-
16 tion to pay \$4,000 a month?

17 THE WITNESS: Yes. Probably somebody at Kaye,
18 Scholer told me that is what I should do and I said fine.

19 THE COURT: And you paid them back?

20 THE WITNESS: Yes.

21 THE COURT: And that is your signature?

22 THE WITNESS: Yes.

23 MR. GARMANSKY: Plaintiff offers Exhibit 25 in
24 evidence.

25 MR. PARKER: No objection.

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Somekh - direct

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(Plaintiff's Exhibit 25 received in evidence.)

Q Mr. Somekh, Plaintiff's Exhibit 25 states "Reference is herewith made to the action instituted in the Supreme Court New York County wherein you are the plaintiff and I am the defendant to recover the sum of \$125,000 with interest at 8-1/2 per cent, index number 1488, 1/19/74."

Does that refresh your recollection, Mr. Somekh --

A It does not do anything for me, sir.

Q May I finish the question.

A Go ahead.

Q Does that statement in Plaintiff's Exhibit 25 refresh your recollection that you were sued by First National City Bank?

A I am not telling you I wasn't. If you tell me I was and the paper says so, I was. I don't remember being served, I don't remember handling the matter because it went to Kaye, Scholer and they handled it. I haven't really seen the papers. I don't remember anything about it.

Q Mr. Somekh, after Parklane became a privately-owned company, did you sell any real estate to Parklane?

A Yes.

Q What did you sell?

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2 A My interest in Tulsa, not the whole thing. My
3 interest in Tulsa and the Pensauken property.

4 Q Is the Pensauken property developed property?

5 A I am making plans to develop it now.

6 Q At the time of the sale, was it vacant land or
7 developed property?

8 A It was vacant land.

9 Q When did this sale occur?

10 A December 30, 1974.

11 Q Would you please briefly describe Riverbend,
12 what it is?

13 A Riverbend is a 100 some odd acre site in Okla-
14 homa facing the Oral Roberts University and braced on
15 the other side by the river. It's a PUD zoning area
16 where the city gives you a total amount of density that
17 you can do and you can put that density wherever you want
18 to on the site.

19 This was a piece of land I acquired in 1970 or
20 1971, I think. Subsequently I did the master planning,
21 I did initial face planning, I did the site work and
22 developed a partnership with Lehman partners or several
23 of the Lehman partners whereby --

24 Q Thank you.

25 THE COURT: Let him finish.

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2 A Whereby they would advance \$1,350,000 , have the
3 650 that I advanced already and that the first \$650,000
4 coming out of the project would be mine whereby they would
5 get the first 92 per cent of losses of a million, three.

6 THE COURT: Does that include depreciation?

7 THE WITNESS: Yes.

8 THE COURT: Is this federally financed or
9 insured?

10 THE WITNESS: No, sir.

11 THE COURT: State financed?

12 THE WITNESS: No.

13 THE COURT: Were you using a double declining
14 depreciation scale as first owners?

15 THE WITNESS: Yes. We were using component
16 double declining and after that the ratios would be as
17 follows; 55 per cent to me in losses and gains, 40 per
18 cent to the limits said, 5 per cent to Lehman Realty.

19 Q Mr. Somekh, how long had you owned the Pensauken
20 property before you sold it to Parklane?

21 A Since 1968.

22 Q How much did you pay for the property then?

23 A \$185,000.

24 Q How much did you sell it to Parklane for?

25 A 300,000.

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rkjb

Somekh - direct

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MR. GARMANSKY: Would you mark this document
Plaintiff's Exhibit 26 and this document Plaintiff's Ex-
hibit 27.

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(Plaintiff's Exhibit 26 and 27 marked for iden-
tification.)

Q Mr. Somekh, do you recognize Plaintiff's Ex-
hibit 26?

A It's minutes of a meeting of the board of
directors of Parklane Hosiery Company December 30, 1974.

Q Were you present at that meeting?

A I have to read it, sir.

THE COURT: Read it.

(Pause.)

A Yes.

Q Is it not a fact at that board of directors
meeting you sold your property interest in Pensauken to
Parklane and also an interest in the Riverbend develop-
ment project?

A I stated that the transaction took place on
December 30th.

THE COURT: And those minutes reflect the
approval of the board of directors?

THE WITNESS: That is right.

MR. GARMANSKY: Plaintiff offers Exhibit 26 into

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Somekh - direct

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2 evidence.

3 MR. PARKER: No objection.

4 (Plaintiff's Exhibit 26 received in evidence.)

5 Q Mr. Somekh, in addition to the sale of the real
6 estate that the board of directors voted upon, you were
7 also awarded a salary increase to \$150,000 per annum, is
8 that correct?

9 A That is what it so states but that took place
10 much earlier so I don't know why it's here. It's just
11 a repetition of what took place some months before.

12 Q Is it not a fact, Mr. Somekh, your company's
13 bylaws reflect that any increase in salary to an officer
14 must be done by the board of directors and not by execu-
15 tive committee?

16 A I never seen the bylaws.

17 Q You have never seen your own company's bylaws?

18 A No, sir.

19 Q Mr. Somekh, do you recognize Plaintiff's Exhibit
20 27 marked for identification?

21 A They look like notes from a balance sheet or
22 a statement.

23 Q Those two pages came off Parklane's 10K report
24 filed with the Commission for the fiscal year ending
25 September 27, 1974, which was filed with the Commission

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2 on or about July 10, 1975.

3 A If you say so, Mr. Garmansky.

4 MR. GARMANSKY: I offer Plaintiff's Exhibit 27
5 in evidence.

6 MR. PARKER: No objection.

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7 (Plaintiff's Exhibit 27 received in evidence.)

8 Q Mr. Somekh, does Plaintiff's Exhibit 27 in evi-
9 dence accurately set forth the terms of the sale and the
10 payout to you of your interest in the Tulsa and Pensauken
11 properties?

12 A The only way you can do that, Mr. Garmansky, is
13 by conforming this probably to the contracts that were
14 drawn between Parklane and me and I am certainly not
15 really familiar with all the fine print that went on in
16 both of them.

17 Q To the best of your recollection.

18 MR. PARKER: It's not a question of recollection.

19 THE COURT: Objection sustained.

20 Q Mr. Somekh, do you know how much you sold the
21 Tulsa property to Parklane for?

22 A Well, it was based on appraisal done by Bankers
23 Trust and I think it was around close to a million dollars.

24 Q What was the total amount of the sale to Parklane,
25 the two properties, Pensauken and Tulsa?

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Somekh - direct

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2 A Probably 1,280,000, 1,300,000. I really don't
3 know what the exact figures were.

4 Q Around three?

5 A Yes.

6 Q To the best of your recollection, when did you
7 begin to receive any moneys from Parklane on the sale of
8 those two assets?

9 A Probably in January, 1975. I don't know. I
10 think there was a slight cash consideration. I think
11 there was \$20,000 in cash. Something like that. There
12 wasn't really much, one way or the other.

13 MR. GARMANSKY: I would like this document
14 marked as Plaintiff's Exhibit 28. There are 40 checks,
15 Xeroxed checks, in that exhibit.

16 (Plaintiff's Exhibit 28 marked for identifica-
17 tion.)

18 MR. GARMANSKY: The last check, check number 40
19 is dated March 30, 1976.

20 Q Mr. Somekh, can you identify Plaintiff's Exhibit
21 28 marked for identification?

22 A They are Xeroxed copies of Parklane checks.

23 (Continued on next page.)
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Somekh-direct

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Q There are approximately forty checks in
Plaintiff's Exhibit 27.

A Yes.

Q Did you receive each of those checks?

A If these checks were made out to me and if
Parklane says they paid me the money, I am sure they did,
but to tell you I really know when I got each one, I don't.

Q I didn't ask you when you got each one.
I said did you receive each of the checks?

A I can't tell you, but if Parklane says I did,
I did.

Q Mr. Somekh, isn't it a fact that from around
October 1974 to the present Parklane has paid you over
\$1 million in cash?

A I made available to Parklane \$1,200,000.
That is how they paid me.

Q Yes or no?

A If you say they did, they did. I don't know
how much of that is in salary, how much of that is in
payments. I don't know what it is.

Q The first check is dated October 8, 1974,
pay to the order of Herbert Somekh \$12,500.

A So --

Q What was the purpose of that payment by Parklane

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to you?

A I really don't know.

Q You have no knowledge?

A No, sir.

Q The second check is dated October 21, 1974,
payable for \$10,000.

Do you know what the purpose of that payment
to you was?

A Probably because I wanted it, and that will go
for every other check.

Q Thank you.

I have a check dated November 12, 1974, payable
to you in the sum of \$62,500.

What was the purpose of that check to you,
Mr. Somekh?

A Because I wanted it.

Q The next check is dated November 15th --
December 9, 1974, in the amount of \$56,000, payable to you.

Do you know what the purpose of that check
was?

A No.

Q You didn't want that money?

A They must have had a reason to give it to me
and they gave it to me.

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Q You don't know what that reason was?

A No. You would have to go back and ask them why was each payment made, was it a note payment, an interest payment. I don't know what they are and I don't know how they assign the numbers.

Q Is it your recollection the checks I have just gone through were in payment of your real estate that you sold?

A No, I don't think so. They may or may not. It couldn't have been for my real estate because I hadn't sold my real estate to the company, so it couldn't have been for my real estate.

Q I show you a check dated December 30, 1974 in the sum of \$150,000.

What was the purpose of that check to you?

A That was my advance salary for calendar year 1975.

Q What did you do --

A For fiscal or calendar.

Q That was for your prepaid salary?

A That is right.

Q What did you do with the money?

A I put it in the bank.

Q Where did it go from there, Mr. Somekh?

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Somekh-direct

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A To the bank.

Q What bank?

A Bankers Trust.

Q Is it not a fact that that money was paid
in reduction of your personal loan?

A It certainly is a fact.

Q Mr. Somekh, isn't it a fact since January 1,
1975 you have received approximately \$25,000 each month
from Parklane which you in turn paid Bankers Trust in
reduction of your loan?

A Yes, sir.

Q Mr. Somekh, are you still paying First National
City Bank, which is now City Bank, the sum of \$4,000 every
month?

A Yes.

Q Do you receive \$4,000 every month from Parklane?

A One of the notes they owe me is payable at
\$4,000 a month.

Q Do you owe National Bank of North America
any money today?

A No, sir.

Q When did you pay off your loan to them?

A It was the end of last year, the end of '75.

Q Are you certain of that, sir?

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2 A Yes, sir. It has to be December '75. I
3 turned over the money to 433, which is the partnership,
4 and they paid off the bank, so I don't know when they
5 paid it, but I gave them my \$50,000.

6 Q I show you Plaintiff's Exhibit 16 marked for
7 identification, Mr. Somekh.

8 Turn to page 81, please.

9 A All right.

10 Q Were you asked these questions and did you
11 give these answers, line 10:

12 "Q The loan at the Bank of North America, was
13 there ever an agreement signed at which you would pay
14 back a certain sum?

15 "A No.

16 "Q Is that loan still outstanding?

17 "A No.

18 "Q When was it paid?

19 "A In November.

20 "Q '74?

21 "A Right.

22 "Q How much did you pay?

23 "A \$50,000."

24 A Right.

25 Q You just testified that you paid off the loan

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at the end of last year. Last year was 1975.

A I am sorry. It was paid in 1974.

Q Mr. Somekh, from what source did you receive the money to pay back the National Bank of North America?

A From my bank account. I gave 433 JV a check for \$50,000.

Q Isn't it a fact that check came from Parklane Hosiery to you?

A Not necessarily, because I had many other streams of cash coming in.

Q Mr. Somekh, did you ever have any discussions with representatives of Thomson, McKinnon and Foster Securities those two firms who were doing the appraisal reports, concerning your personal loans at the three banks you have testified to?

A No, sir.

Q Did you ever tell representatives of Thomson, McKinnon or Foster Securities Corporation that one reason you were going private was to pay back your bank loans?

A No, because it was not a reason.

Q Thank you.

Did you ever inform Mr. Russ and Mr. Rubinstein that you decided to sell property that you owned to Parklane in August of 1974? Did you ever say that to them

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in August of 1974?

A I told them it was contemplated and I had not decided at that particular time.

Q Did you ever inform Thomson, McKinnon or Foster Securities that the only way to pay back your loans was to bring the company private?

A Do you want me to lie to them? That was not the only other method. I had many methods to pay.

Q Yes or no?

A No, I would not.

MR. GARMANSKY: I would like to mark these exhibits as 29, 30, 31, 32 and 33.

(Plaintiff's Exhibits Nos. 29 through 33 were marked for identification.)

Q Parklane leases property located at 68-70 Nassau Street, New York City; is that correct?

A Yes.

Q How long has it had that lease?

A It probably dates back originally to 1957 or '58.

Q What has Parklane done with the premises it leases?

A It operated a store on the premises for awhile.

THE COURT: Anything else?

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1 THE WITNESS: I am afraid because then he
2 will tell me --

3 THE COURT: Tell us your best recollection.

4 A We operated a store. Subsequently I divided
5 the premises in two portions and leased part of it to a
6 delicatessen, a take-out food store, and I maintained the
7 other part.

8 THE COURT: Is that for Parklane Hosiery?

9 THE WITNESS: Yes.

10 Subsequently, in the '60s, I franchised that
11 store to two partners who operated that store, plus
12 another store that we had on Dey Street.

13 Q Are you finished?

14 A That is about the size of it, yes.

15 Q In 1964, at those premises, there was a
16 delicatessen subleasing and there was a Parklane franchisee;
17 is that correct?

18 A Yes.

19 Q Did you ever enter into negotiations on behalf
20 of Parklane for the cancellation of that leasehold?

21 A Yes, sir.

22 Q When for the first time, do you recall?

23 A If you are talking about my personal involvement
24 in negotiating directly?
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2 Q Yes.

3 A I probably didn't get into it until maybe four
4 years after it started.

5 Q Tell us when that was.

6 A My guess is, my first involvement, direct
7 involvement may have been around '73. There was some
8 negotiation in '68.

9 Q When you entered the negotiations, who did you
10 negotiate with?

11 A Mr. Robert Curtis.

12 Q Who does Mr. Curtis work for?

13 A He is chairman of the board of Ely Cruikshank &
14 Company.

15 He has retired since then.

16 Q Do you know who Mr. Curtis was acting on behalf
17 of?

18 A It depends what time and when?

19 Q In '74.

20 A He said it was the Federal Reserve Bank of
21 New York.

22 Q During 1974, isn't it a fact you had dis-
23 cussions with Mr. Curtis at both meetings and letters
24 for the cancellation of Parklane's lease at the premises
25 we have described?

0000240

1 A It is a fact.

2 Q Isn't it also a fact Mr. Curtis made an offer
3 to you for complete vacating of the Nassau Street
4 premises of \$800,000 in May 1974?
5

6 A He probably did, if that is the date.

7 Q Is that your best recollection?

8 A No. I think he made the same offer before.
9 One was a conditioned offer where it gradually went down
10 to zero, and then another time he gave me ten days or
11 something to deliver, so I don't know really which one you
12 are talking about. I think the graduated one came earlier
13 than the other one.

14 Q Do you recall Mr. Curtis making you an offer
15 in May of 1974?

16 A If you can show me his letter or something,
17 I will remember.

18 Q In other words, your answer is no, you don't
19 recall?

20 A Specifically to say there was, no. I would
21 have to look and pinpoint what happened and when.

22 Q Can you identify Plaintiff's Exhibit 29?

23 A That is a letter from me to Mr. Curtis.

24 Q Had you received that letter, Plaintiff's
25 Exhibit 29?

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rkjb

Somekh - direct

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A Apparently I sent it to Mr. Curtis.

Q Is that your signature on Plaintiff's Exhibit
29?

A That is a stamp, yes.

MR. GARMANSKY: Plaintiff offers Plaintiff's
Exhibit 29 in evidence, your Honor.

MR. PARKER: No objection, your Honor.

(Plaintiff's Exhibit 29 received in evidence.)

Q Do you recognize Plaintiff's Exhibit 30?

A Yes, I recognize it.

THE COURT: Can you identify it?

THE WITNESS: It was a letter that was framed
by Ron Ungar of Kaye, Scholer for my signature on June
27, 1974 with our franchisee present at Kaye, Scholer.

Q That is your signature on Plaintiff's Exhibit
30?

A Yes.

MR. GARMANSKY: Plaintiff offers Plaintiff's
Exhibit 30 into evidence.

MR. PARKER: No objection.

(Plaintiff's Exhibit 30 received in evidence.)

Q Do you recognize Plaintiff's Exhibit 31?

A Yes, I remember this letter.

THE COURT: What is it?

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Somekh - direct

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THE WITNESS: It's a letter from Mr. Curtis to
me.

THE COURT: You remember the letter? You got it?

THE WITNESS: Yes.

THE COURT: Do you object to it?

MR. PARKER: No.

(Plaintiff's Exhibit 31 received in evidence.)

Q Do you recognize Plaintiff's Exhibit 33?

A Yes.

Q What is it?

A A letter from me to Tom Baggott dated October
29th informing him that Steve Fried said that he may have
found the mortgage documents that were lost. That is his
eyes, and also telling him that I had a conversation or
some conversations with Mr. Curtis regarding the Federal
Reserve property and that he shouldn't count on having the
money in the bank.

THE COURT: Do you object to it?

MR. PARKER: No.

MR. GARMANSKY: Your Honor, I object to that
characterization.

THE COURT: I will read it.

MR. GARMANSKY: Offer Plaintiff's Exhibit 33
in evidence.

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Somekh - direct

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(Plaintiff's Exhibit 33 received in evidence.)

MR. GARMANSKY: I would like to mark one more
exhibit.

(Plaintiff's Exhibit 34 marked for identifica-
tion.)

Q Mr. Somekh, do you recognize Plaintiff's Ex-
hibit 34?

A It's a letter dated May 16th from Ely Cruickshank
to me.

THE COURT: Did you ever get it?

THE WITNESS: I am sure I have.

THE COURT: Show it to counsel.

MR. GARMANSKY: Plaintiff offers it.

(Continued on next page.)

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1 rkjb
2 MR. PARKER: No objection.

3 (Plaintiff's Exhibit 34 received in evidence.)

4 Q Mr. Somekh, does Plaintiff's Exhibit 34 refresh
5 your recollection of an \$800,000 offer made by Mr.
6 Curtis in May of 1974 to you?

7 A Yes, sir.

8 Q Mr. Somekh, do you recall on or about June 27,
9 1974 making a counteroffer to Mr. Curtis for the sum of
10 \$1,200,000 for vacating of the Nassau Street premises?

11 A Yes, sir.

12 THE COURT: Do you have any more documents on
13 this aspect of the case?

14 MR. GARMANSKY: No, I do not believe so, your
15 Honor.

16 I expect to be finished with the witness in
17 approximately 10, 15 minutes.

18 THE COURT: He might not be tired but I am.

19 I will see you tomorrow morning at 10:00.

20 (Court adjourned to June 4, 1976.)

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WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Herbert N. Somekh (Resumed)	86			
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EXHIBIT INDEX

<u>Plaintiff</u>	<u>Identification</u>	<u>In Evidence</u>
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SECURITIES AND EXCHANGE COMMISSION

V.

76 Civ. 2024

PARKLANE HOSIERY CO., INC.,
HERBERT N. SOMEKH

June 4, 1976
10:00 a.m.

ooo

T1A

(Trial resumed.)

XXX

HERBERT N. SOMEKH, resumed.

XXX

DIRECT EXAMINATION (Continued)

BY MR. GARMANSKY:

Q Now, Mr. Somekh, did you have any conversations
with Mr. Curtis in or about July, 1974?

A I had some correspondence, but I can't remember
conversation.

Q Thank you. Did you have a meeting with Mr.
Curtis on or about October 4, 1974?

A Yes, sir.

Q Where was the meeting held?

A At Chase Building, at the club upstairs.

Q This was a luncheon meeting?

A Yes, sir.

Q Who was present?

0000247

1 A Mr. Curtis and myself.

2 Q Do you know who called for the meeting?

3 A Mr. Curtis.

4 Q When did he call you to set up this meeting?

5 A Probably the day before.

6 Q Did you know what was going to be discussed at
7 that meeting before you came?

8 A Yes, sir.

9 Q Isn't it correct that you were going to discuss
10 the leasehold of Parklane on Nassau Street?

11 A Yes, sir.

12 Q Now, Mr. Somekh, would you please tell us what
13 was discussed at that meeting and by whom?

14 A I came into the meeting fairly late because
15 traffic was very heavy coming in from the Island. I got
16 there about probably 1:00. Mr. Curtis talked about an
17 hour and 15 minutes about his vacation in Lake Louise and
18 Banff, and about an hour and 15 minutes later I really was
19 beginning to wonder what was I doing there.

20 At that moment or around that time Mr. Curtis
21 mentioned that he really had nothing specific, he knew
22 that my authority from my sub-tenant and my franchisee
23 had run out, but he was going to a meeting at the Federal
24 Reserve, and if he could get an offer, do I think that
25

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lhjb

Somekh - direct

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the tenant and the franchisee would hold to the price that they mentioned in June.

I suggested that I had no control over them, and I did not know that, and, of course, he also said that he had nothing to offer. He wondered whether I would ask these people whether they would hold to the price, and I suggested that there was no way that I would do that since I would only be playing the fool, and if he had anything concrete, to make a concrete proposal and I would do my best to get their consent.

He then said that he was going to a meeting at the Federal Reserve Bank and that he would get in touch with me after the meeting.

He subsequently got in touch with me later on that day to tell me that he had nothing to tell me, and that was -- at least these were the events of October 4th.

Q Okay. Mr. Somekh, did you believe at that meeting on October 4, 1974 that you were negotiating with Mr. Curtis for the cancellation of the lease?

MR. PARKER: Objection.

MR. GARMANSKY: Your Honor, under --

THE COURT: Yes, all right. Answer.

A No, sir.

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2 Q Isn't it true, Mr. Somekh, that you told Mr.
3 Curtis at that meeting that the Parklane lease can be
4 cancelled upon payment by the Federal Reserve Bank of
5 \$1,200,000?

6 A No, sir. I suggested --

7 Q Thank you, Mr. Somekh.

8 THE COURT: Let him answer. You suggested
9 what?

10 THE WITNESS: I suggested that if the franchisee
11 and the sub-tenant would hold to their price, and if he
12 were to give me a concrete offer that I can go back to
13 them with and they would agree, then a deal can be made.
14 Other than that I had no authority to act on anybody's
15 behalf.

16 Q Isn't it true, Mr. Somekh, that you stated to
17 Mr. Curtis that you would try to obtain a time extension
18 of your sub-tenant's acceptance of \$600,000?

19 A No, sir. That was only if he came back to me
20 with a concrete offer.

21 Q Isn't it also true, Mr. Somekh, that you told
22 Mr. Curtis at this meeting that Parklane would agree to
23 accept \$300,000 out of the \$1,200,000 for cancellation of
24 the lease?

25 A Provided he came with an offer, provided my

0000250

sub-tenant and franchisee agreed to this offer that was not forthcoming.

Q Isn't it also a fact, Mr. Somekh, that you stated to Mr. Curtis that if the Federal Reserve Bank would offer \$1,200,000, that you would secure letters from your sub-tenants for a date certain for the vacating of the premises?

MR. PARKER: Objection as to form.

THE COURT: No, I will permit it. Go ahead.

A No, sir, no. Mr. Curtis was to come to me with a definite offer if the Federal Reserve were to authorize him to make such an offer, and if he had such an offer, then I was to go to my tenant and secure their approval.

Q Mr. Somekh, I show you Plaintiff's Exhibit 32 marked for identification. I'd like you to look on page 2, the next to last paragraph, starting "Mr. Somekh is of the opinion," continuing on to page 3, point 3.

A Mr. Somekh is of the opinion that if he gave me an offer --

THE COURT: Read it to yourself.

Q No, sir, you have to read silently.

THE COURT: Read it to yourself.

Q It is not in evidence, Mr. Somekh.

(Pause.)

A Yes, I read this.

0000251

Q Did you finish on page 3, sir?

A You want me to read the whole thing or just this paragraph?

Q That paragraph to the bottom of page 2 and then to the top of page 3.

MR. PARKER: How far have you asked the witness to read?

MR. GARMANSKY: From the next to last paragraph on page 2 to the first two paragraphs on page 3.

MR. PARKER: You are not restricting the witness?

MR. GARMANSKY: No. If the witness wants to read the whole document, he is welcome to.

THE WITNESS: Can I read further?

THE COURT: Sure. You can read the whole document. Go ahead.

(Pause.)

THE WITNESS: All right, I read it.

Q Mr. Somekh, does that refresh your recollection as to anything you discussed with Mr. Curtis at the October 4th meeting?

A Yes, very clearly, and he states it very well here.

Q Mr. Somekh, do you agree with the statements contained in Plaintiff's Exhibit 32?

MR. PARKER: Objection as to form, your Honor.

THE COURT: All right, it is not in evidence. You may agree with it. Now let's find out what your recollection is as refreshed by that document.

THE WITNESS: Your Honor, his --

THE COURT: No, don't tell us what he said. Tell us what you remember.

THE WITNESS: Well, my memory is fairly clear. Mr. Curtis suggested and asked me -- and he certainly was aware that my authority from the sub-tenant and franchisee had expired. His experience with them prior to this was that they would change their mind and ask for more money, and he asked me whether they were going to do the same again. I said I really did not know, I have no control over them, that they were sort of wild in terms of expectations, and there was no way I could really guarantee anything or do anything.

If he wanted to give me a specific offer, then I would attempt to contact them and get them to agree to that offer. Then he, I suppose, tried to ascertain whether an amount of \$300,000, if this was part of the offer, would be agreeable to Parklane, and I suggested, as I suggested to him previously, Mr. Garmansky, that Parklane was not the one that would hold anybody else up.

0000253

BY MR. GARMANSKY:

Q Mr. Somekh, is it not a fact that in June, 1974 the sub-tenant, the deli, was willing to accept \$600,000?

A Yes, sir, for a ten-day period, I think.

Q Is it not a fact that in that ten-day period, they ultimately extended it through the month of August, 1974?

A Yes, sir.

Q Thank you. You testified that Mr. Curtis contacted you -- contacted you later in the afternoon of October 4th, is that correct?

A Yes, sir.

Q What did he say to you then?

A He said he had absolutely nothing to convey, that it was long, tedious meeting, and that he had absolutely no instructions of any kind.

Q Is it not a fact that after the October 4th meeting Mr. Curtis informed you that he was going to place before the Federal Reserve Bank your counter-offer of \$1,200,000?

A No, sir.

Q That's not a fact, sir?

A No, sir.

Q Did you know that Mr. Curtis was going to contact you after the October 4th meeting?

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2 A No, sir.

3 Q You did not?

4 A No, sir.

5 Q Mr. Somekh, did you inform the shareholders of
6 Parklane at the October 14, 1974 meeting of your meeting
7 with Mr. Curtis on or about October 4, 1974?

8 A No, sir.

9 MR. PARKER: Objection, your Honor. There is no
10 relevance or materiality to that matter.

11 THE COURT: There might well be. I will permit
12 it. Go ahead. Answer.

13 A (Continuing) No, sir, I did not.

14 Q Now, Mr. Somekh, after your October 4th meeting
15 with Mr. Curtis and the telephone conversation that you
16 say occurred later that same day, when was the next time
17 that you spoke to Mr. Curtis?

18 A My guess may be six months or so after that.

19 Q Six months or so?

20 A Probably.

21 Q Sir, I show you what has been received in evi-
22 dence as Plaintiff's Exhibit 33. Would you read the last
23 paragraph aloud, starting with the word "also"?

24 THE COURT: You want it aloud?

25 MR. GARMANSKY: Yes, sir.

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1 lhmch

Somekh-direct

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THE COURT: Is this in evidence?

MR. GARMANSKY: Yes, it is.

THE COURT: All right.

MR. GARMANSKY: This is a letter to Mr. Baggott dated October 29, 1974.

A "Also, and again this is off the record since until I have the money in my hand, I don't want to say that I have any deals, but I have had several conversations with the Federal Reserve and it seems that we may be heading towards a deal that would net Parklane \$300,000 that can close around the end of the year. I am keeping my fingers crossed since I realize what this would mean so let's both hope it gets done. Many thanks. Sincerely."

Q Mr. Somekh, the statements that you have just read, were those statements truthful and accurate at the time you wrote Plaintiff's Exhibit 33 in evidence?

A They were true to the extent of my wanting to tell Tom that I did have a conversation with Mr. Curtis, that Mr. Curtis -- I think Tom knows Mr. Curtis' pattern over the previous seven years, that this was always on and off, and I really -- I think I was going away right after that, and I just wanted to let Tom know that I had talked to the guy.

THE COURT: That's Tom Baggott?

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2 lhmch

Somekh-direct

THE WITNESS: Yes, sir.

Q Is there anything inaccurate in the statements you just read?

A I would say it is probably verbose and unnecessary.

THE COURT: But is it inaccurate? That's a different story.

THE WITNESS: I would say it is, sir.

Q It is inaccurate?

A Yes, reflecting back on the exact nature of the conversations, I would say that it was not very accurate.

Q But at the time you wrote Plaintiff's Exhibit 33, did you believe the statements to be accurate?

A I am not so sure that I really thought about it, outside of dictating it in a machine and probably going away, but upon reflection now, I would say that it is not.

Q Mr. Somekh, I place before you Plaintiff's Exhibit 1 in evidence, the proxy statement.

Would you please read the last two sentences on page 15?

A "On the basis of negotiations" -- is that where you want me to start, sir?

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1 3 lhmch

Somekh-direct

2 Q You may start there. Yes, that's fine.

3 A "On the basis of negotiations with the
4 franchisee and other subtenants, the amount which would
5 have been required to be paid to them would have represented
6 substantially all of the sum offered. The offer has
7 been withdrawn and there are no negotiations at present.
8 The company is unable to determine if another offer will
9 be made."

10 Q Mr. Somekh, what does the offer refer to that
11 you just read, Plaintiff's Exhibit 1?

12 A That was the May offer of Mr. Curtis, I
13 think it was made on May 16th or something, which was
14 returnable to him no later than May 26th. I think -- I
15 am not sure about the dates -- but I think they are
16 somewhere around that time.

17 Q Mr. Somekh, is it your understanding that
18 that \$800,000 offer which you just described was withdrawn?

19 A Yes, sir.

20 Q Is it your understanding that this offer was
21 withdrawn solely by Mr. Curtis?

22 MR. PARKER: I object to the inquiry as to
23 the witness' understanding. I think if he wants to
24 call for conversation, maybe that's the way to do it.

25 THE COURT: Sure, that's the way to do it.

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2 Q Did you have any conversations with Mr. Curtis
3 in which Mr. Curtis withdrew the \$800,000 offer?

4 A I had some correspondence with Mr. Curtis.

5 Q Just correspondence?

6 A Yes, sir.

7 Q What was the date of the correspondence?

8 A I think it was July 1st, sir.

9 THE COURT: July 1st, what year?

10 THE WITNESS: 1974, sir.

11 Q I show you what has been received in evidence
12 as Plaintiff's Exhibit 31.

13 Is that the correspondence you are referring
14 to in which Mr. Curtis withdrew the \$800,000 offer?

15 A Yes, sir.

16 Q Would you please point out, Mr. Somekh,
17 where in Plaintiff's Exhibit 31 it states that the
18 \$800,000 offer is withdrawn?

19 MR. PARKER: If your Honor please, that
20 document speaks for itself. It is in evidence.

21 THE COURT: All right, I will read it.

22 Go ahead.

23 THE WITNESS: Shall I read it, sir?

24 THE COURT: No.

25 A In addition, Mr. Garmansky, the terms of his

0000259

1 5 lhmch

Somekh-direct

2 letter, of his May letter, canceled the offer by itself.

3 Q Is it not a fact, Mr. Somekh, that the May
4 letter did not withdraw the offer, but that the offer
5 expired if you did not accept it?

6 MR. PARKER: If your Honor please, that
7 document is also in evidence and it speaks for itself.

8 THE COURT: Is it?

9 MR. PARKER: Yes, your Honor.

10 THE COURT: Okay, I will read it.

11 Go ahead.

12 Q Mr. Somekh, did Mr. Curtis ever break off
13 negotiations for the cancellation of the Parklane lease?

14 MR. PARKER: Objection, your Honor. I think
15 if there are conversations they ought to be called for,
16 and not these conclusory terms.

17 THE COURT: We will get to the conversation.

18 Did there ever come a time when you had a
19 conversation with Mr. Curtis when he said, "I am not going
20 to negotiate any more with you about this lease"?

21 THE WITNESS: In every conversation, sir --

22 MR. PARKER: If your Honor pleases, may I
23 state my further grounds of the objection?

24 THE COURT: Sure.

25 MR. PARKER: There has been testimony that

0000260

1 6 lhmch

Somekh-direct

2 has covered this ground. This is repetitious.

3 They testified about the last meeting these
4 two gentlemen had and what took place there. Now to come
5 back in this form is completely improper, it seems to me,
6 your Honor.

7 THE COURT: I don't know. There might be
8 other conversation.

9 MR. PARKER: I think he ought to call for
10 another conversation. He called for the last meeting they
11 had, he got the full conversation of the October 4th
12 meeting, as this witness testified, and that's October 4,
13 1974.

14 THE COURT: Who said that's the last meeting?
15 I didn't hear him say it.

16 MR. PARKER: I think that's the testimony,
17 but if I am wrong, I stand corrected, your Honor.

18 THE COURT: I didn't hear him say it. If I
19 heard what your client testified to, I can't really say
20 that that is a breakoff of the negotiations, nor can I
21 agree with his characterization that there were no
22 negotiations.

23 I mean, that's the guts of the whole meeting,
24 besides Lake Louise and Banff.

25 Go ahead. Answer the question.

0000261

1 7 lhmch

Somekh-direct

2 THE WITNESS: What was the question, sir?

3 THE COURT: Did there come a time when Mr.
4 Curtis said, "We are not going to have any more
5 negotiations about this lease," or something to that
6 effect?

7 THE WITNESS: Yes. Every time I had ever met
8 Mr. Curtis, he always said, "This is the last time, and
9 that's the best deal, and that's it, and if it is not
10 done" then I am not going to hear from him for ever and
11 ever.

12 THE COURT: When was the last time you talked
13 to him?

14 THE WITNESS: Recently, sir? Until now,
15 or what are we talking about?

16 THE COURT: I don't care. Whenever it is.
17 Work backwards.

18 THE WITNESS: He called me about, oh, a
19 month ago or so.

20 THE COURT: The time before that?

21 THE WITNESS: That was I think maybe -- wait
22 a minute, now. We are in -- around April, probably April
23 the year before.

24 THE COURT: The time before that?

25 THE WITNESS: That was October.

0000262

1 8 lhmch

Somekh-direct

2 THE COURT: Tell me, you have been involved
3 in negotiations a lot, haven't you?

4 THE WITNESS: Yes, sir.

5 THE COURT: Have you ever said to anybody on
6 the other side that "This is my last offer; if you don't
7 take it, forget it"?

8 THE WITNESS: That is not my kind of posture,
9 but it is Mr. Curtis' posture. He is that type. You
10 know, there are some people who like to negotiate that
11 way and some people who never close a door.

12 THE COURT: When people say this to you in
13 negotiations, do you always believe it?

14 THE WITNESS: Well, you know, it depends on
15 who. If you are talking about a principal who has his
16 own parameters, it could be. But if you are talking
17 to in many respects a messenger or --

18 THE COURT: Let's take an agent.

19 THE WITNESS: An agent, because he doesn't
20 really have the parameters here to act.

21 THE COURT: So then you wouldn't believe it?

22 THE WITNESS: Well, basically he really never
23 has anything to convey.

24 THE COURT: Okay.

25 THE WITNESS: Unless he has something that he

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1 9 lhmch

Somekh-direct

2 can put in writing, because it doesn't mean anything.

3 THE COURT: All right. Go ahead, Mr. Garmansky.

4 MR. GARMANSKY: Thank you, your Honor.

5 Q Mr. Curtis -- excuse me.

6 MR. GARMANSKY: Strike that.

7 Q Mr. Somekh, is it not a fact that Mr. Curtis
8 was to contact you when he had word from the Federal
9 Reserve Bank concerning the payment of \$1,200,000 to you?

10 A That's not what he said at all.

11 THE COURT: Mr. Somekh, it is intriguing to
12 me. How does the Federal Reserve Bank get involved with
13 two little stores downtown? Do they own the building?

14 THE WITNESS: Would you like a long story, sir?

15 THE COURT: No.

16 Do they own the building?

17 THE WITNESS: They assembled the block front
18 between John Street and Nassau Street -- and Maiden Lane
19 in 1965, sir.

20 THE COURT: But they own the building now?

21 THE WITNESS: They owned the block since then.

22 THE COURT: I get the picture. That's why
23 they are interested?

24 THE WITNESS: By now they demolished the whole
25 block, sir, and we are the only tenant that's left, but

0000264

1 10 lhmch Somekh-direct

2 we are on a corner, and a corner in an assembly is not
3 worth as much as something in the middle, because they
4 can always build around you or they can set back.

5 MR. GARMANSKY: Your Honor, may I just have
6 one moment, please?

7 THE COURT: Sure.

8 (Pause)

9 THE WITNESS: Your Honor, can I comment a little
10 further? I think this may amuse you.

11 THE COURT: No. I've got enough amusement.
12 Don't worry about it.

13 Q I show you what has been marked Plaintiff's
14 Exhibit 15 for identification. I am opening up to page 252.

15 Mr. Somekh, do you recall being asked these
16 questions and do you recall giving these answers, beginning
17 on line 20:

18 "Q I see.

19 "Now, why did you communicate that to Mr.
20 Curtis, where you could be reached?

21 "A Because Mr. Curtis had told me that he was
22 going to see the Federal Reserve that afternoon.

23 "Q I see.

24 "A And that if he had anything that he would
25 communicate with me the results of the conversations were.

0000265

1 "Q I see.

2
3 "Now, do you know for what reason Mr. Curtis
4 was going to go see the Fed.?

5 "A To see if he could resurrect the deal, as he
6 put it.

7 "Q Okay.

8 "What was the deal though, resurrect what
9 deal?

10 "A Well, whether the offer that we made would
11 be acceptable.

12 "Q What offer did you make?

13 "A Which was the letter that we had sent him in
14 the latter part of June.

15 "Q June of '74?

16 "A Right. He wanted to ascertain whether the
17 subtenant and the franchisee would hold at their price,
18 whether he would be putting himself in a -- in a jam
19 by telling the Reserve that he has a deal and that these
20 people may change their mind again."

21 Mr. Somekh, do you recall those questions and
22 do you recall giving those answers?

23 A Generally, yes.

24 (Continued on next page)

25 0000266

2 Q If you were asked those questions today,
3 your answers would be the same; is that correct?

4 A Yes, sir.

5 MR. PARKER: I think you ought to read on
6 a little more.

7 THE COURT: Is there something missing?

8 THE WITNESS: "I said, Mr. Curtis, under
9 the situation, you know my authority has expired. I can
10 speak for Parklane and if you can put together a deal
11 whereby Parklane would derive \$300,000, I think you are
12 not going to have any problem with Parklane. The question
13 is can we get these people to deliver. I said my feeling
14 was that they have convinced themselves or have reconciled
15 themselves to the 600 or \$300,000."

16 THE COURT: Let me see that.

17 That is all part of one answer, only part of
18 which you read; is that correct, Mr. Garmansky?

19 MR. GARMANSKY: What page?

20 THE COURT: 253 to 254.

21 MR. GARMANSKY: I stopped on line 20, your
22 Honor.

23 THE COURT: But it's all part of one answer.

24 MR. GARMANSKY: There is a question that
25 comes next, "What was the offer, though, you gave to Mr.

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1
2 Curtis?"

3 MR. PARKER: And the answer is left out.
4 The answer to that question was left out.

5 MR. GARMANSKY: I did not read the answer.
6 I stopped at that point.

7 Do you want me to read that in?

8 THE COURT: He already read it.

9 MR. PARKER: I don't think it has been read
10 in.

11 Would you mind if I did?

12 THE COURT: Go ahead.

13 MR. PARKER: The question at line 21 on
14 page 253, "What was the offer, though, you gave to Mr.
15 Curtis?"

16 "A I couldn't give Mr. Curtis any offers."
17 That was the portion, I believe, that was
18 omitted.

19 MR. GARMANSKY: I think then we should finish
20 the answer.

21 "I said, Mr. Curtis, you know the situation.
22 You know my authority has expired. I can speak for
23 Parklane and I said if you can put together a deal where
24 Parklane would derive \$300,000, I think you are not going
25 to have any problems with Parklane. The question is, can

0000268

1 3 rkmch

Somekh-direct

234

2 we get these people to deliver. I said my feelings was
3 that they have convinced themselves or have reconciled
4 themselves to the 600,000 and \$300,000.

5 "Q That was a million two total?

6 "A Right.

7 "Q I see.

8 "A And he said, well, he will go back to the
9 Federal Reserve and he will talk to them.

10 "Q About the million two?

11 "A Right."

12 Q Mr. Somekh, do you know the individuals who
13 transferred their Parklane stock to new PLHC corporation
14 in or around August of 1974?

15 A Yes, sir.

16 Q How many individuals were there?

17 A I think maybe eight or nine.

18 Q Is it not true that you knew these individuals?

19 A Most of these individuals have been associated
20 with Parklane or with me prior to the time we went public.

21 Q Are these individuals close friends?

22 A I wouldn't say that they are friends. They
23 are employees.

24 Q Mr. Somekh --

25 THE COURT: They can be both.

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Go ahead.

Q At the time of the transfer by these individuals and yourself of their Parklane stock to new PLHC corporation in or around August of 1974, did you disclose your personal financial situation to them?

A No, sir.

Q Did you tell them that the bank was pressuring you to repay your loans?

MR. PARKER: Objection as to form.

THE COURT: Yes.

Rephrase it.

Q Did you tell them that the bank had requested you to repay your loans?

A I have never heard Mr. Baggot to request me to pay my loans.

He had asked me to reduce my loans and I certainly was working in that direction.

Q Did you tell these individuals that the bank had asked you to reduce your loans?

A No, sir.

Q Did you tell these individuals that you had intentions of selling property to Parklane after the company went private?

A Yes.

0000270

2 Q Did you tell them you were going to sell this
3 land to Parklane in order to reduce your personal loan?

4 A No, sir, because that was not the reason.

5 MR. GARMANSKY: I have no further questions
6 at this time, your Honor.

7 THE COURT: We have Mr. Baggott.

8 MR. PARKER: He concluded at page 84 of the
9 transcript, your Honor.

10 THE COURT: We have Mr. Baggott on cross-
11 examination. He is here.

12 Mr. Somekh, you step down.

13 (Witness temporarily excused)

14 T H O M A S E. B A G G O T T,

15 previously sworn, testified further as follows:

16 THE COURT: Do you recall you were sworn to
17 tell the truth the other day?

18 THE WITNESS: Yes.

19 THE COURT: The last question was, "A demand
20 loan is not a two-year loan, is it?"

21 And you requested permission to discuss the
22 matter with counsel.

23 Have you had an opportunity to discuss the
24 matter with counsel?

25 THE WITNESS: Yes.

0000271

1 The loan was a demand loan with the oral
2
3 understanding that it would be repaid in two years.

4 CROSS-EXAMINATION CONTINUED

5 BY MR. PARKER:

6 Q Are you suggesting, sir, you had such an oral
7 understanding with the borrowers?

8 A Yes.

9 Q This is an oral understanding that you had
10 with whom particularly by identification?

11 A Mr. Somekh.

12 Q And that was an oral understanding you made
13 at the time the loan was placed in 1971, sir?

14 A Yes.

15 Q Did you record that oral understanding
16 anyplace?

17 A I don't recall if it was recorded in the file.

18 Q Isn't it the fact, Mr. Baggott, that you never
19 called the loan?

20 A No.

21 Q You never demanded immediate repayment, did
22 you?

23 A No.

24 Q And you never stated to Mr. Somekh an amount,
25 any specific amount by which you wanted his personal loan

0000272

1 reduced, did you?

2 A Not a specific amount, no.

3 Q And you never gave him a specific time by which
4 to reduce the loan?

5 A No, I wouldn't call it a specific time.

6 Q What you told him, in words or substance, was
7 that you wanted something at least? Do you remember using
8 that kind of language?

9 A I think I employed the language by saying we
10 want a program of reduction.

11 Q Do you recall ever saying or being asked --
12 that you told him you wanted something at least? Do
13 you recall that language being used to you in any inquiry
14 made of you?

15 A In the course of many, many conversations
16 with Mr. Somekh pertaining to the reduction in repayment
17 of the loan, all kinds of language was employed. I may
18 have used that.

19 Q Do you recall, sir, when you were interrogated
20 by Mr. Garmansky, I believe, during the course of the
21 SEC investigation and you were under subpoena?

22 A Yes.

23 Q Do you remember, sir, being asked this question
24 and giving this answer?
25

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MR. PARKER: This is page 31.

Q "Q But you did tell him you wanted something at least?

"A Yes."

A Then I did.

Q You don't question that you were asked that question and gave that answer?

A No, I don't question I was asked that question.

Q And gave that answer?

A If it's in there, yes, I did give the answer, sure.

Q During the period 1974, sir, Mr. Somekh maintained a bank account at your branch of Bankers Trust, did he not?

A Yes.

Q Was the balance there substantial, sir?

MR. GARMANSKY: Objection.

THE COURT: I will permit it.

A Are you referring to the personal or corporate relationship?

Q The personal.

A No, they were not.

Q Did you at any time monitor the amounts that were in that account?

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A I don't recall.

3

Q You didn't monitor it?

4

A You are talking to the personal relationship?

5

Q Yes.

6

A I don't recall doing that.

7

Q Were you aware of deposits being made in the

8

personal bank account of Mr. Somekh during the year 1974,

9

sir?

10

A I had no reason to check as to whether they

11

were.

12

No, I didn't monitor or check into it.

13

Q And this was during the time, sir, that you

14

testified you were having discussions with Mr. Somekh

15

about reducing the loan; is that right?

16

A That is correct.

17

Q Did you know, sir, during the year 1974

18

of amounts in cash that Mr. Somekh was receiving, that

19

he was entitled to receive, respective to obligations

20

due him?

21

A In the year '74?

22

Q Yes.

23

A I didn't recall any information pertaining to

24

cash payments received by him. The only cash transaction

25

I recall in the personal area was a repayment he made,

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1 I believe in the latter part of '71 or the early part of
2 '72, and that was in cash.

3 As I recall, it was \$80,000.

4
5 Q I wasn't asking you about repayment on the
6 personal loan.

7 A That is the only knowledge I have of cash
8 deposits being made in the account.

9 Q Sir, I was asking you as to your knowledge
10 concerning payments received by Mr. Somekh regardless of
11 whether they were paid to Bankers Trust in 1974.

12 A No.

13 Q In respect of the Rite-Aid mortgage, and you
14 testified about that, did you not, sir?

15 A Yes.

16 Q Did you know whether Mr. Somekh was receiving
17 regular monthly interest payments on that note?

18 A I was aware of that, that it had an interest
19 prepayment on it.

20 Q Did you know the amount of the interest he
21 was receiving?

22 A I don't recall.

23 Q Did you know at that time?

24 A No, I did not.

25 Q Did you know that the proceeds were being

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2 being deposited?

3 A No, I had no -- I did not monitor the personal
4 account.

5 THE COURT: You mean deposited in Bankers
6 Trust?

7 MR. PARKER: Yes, your Honor.

8 Q Do you have any recollection, sir, of the fact
9 that in respect of a transaction with Lehman Brothers,
10 other than Riverbend, that Mr. Somekh was receiving
11 substantial payments from Lehman Brothers during the
12 first year, 1974?

13 A No.

14 Q Were you aware, sir, during 1974 of interest
15 payments and interest income being received by Mr. Somekh?

16 MR. GARMANSKY: I object to the question as
17 being open-ended.

18 THE COURT: I will let it go.

19 Do you know of any?

20 THE WITNESS: No.

21 Q Sir, did you know of the sale of any property
22 by Mr. Somekh in 1974 for which he received in excess of
23 \$50,000? And I am now referring to a sale of property
24 other than the Rite-Aid mortgage.

25 A I can't recall. 0000277

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2 Q Do you, sir, know or did you know in 1974
3 whether Mr. Somekh received consideration in respect of
4 a property which he had an interest in in Philadelphia,
5 Pennsylvania?

6 A Well, he had several properties in Pennsylvania.
7 I can't recall that any monies came to him in that period.

8 Q Do you recall, sir, in 1974, Bankers Trust
9 was repaid the amount of \$2,300,000 in respect of
10 Riverbend?

11 A I in no way was involved in that transaction.

12 (Continued on next page)
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1 Q Apart from the fact that you were not involved,
2 sir, do you know as an officer of Bankers Trust that Bankers
3 Trust received in 1974 the sum of \$2,300,000 in repayment
4 of an obligation arising out of the Riverbend transaction?
5

6 A No.

7 Q Sir, in respect of the corporate obligation which
8 you had indicated originally was in the amount of \$750,000,
9 that was a term loan, was it not?

10 A Yes.

11 Q And that wasn't an oral term loan, that was
12 a written term loan, wasn't it?

13 A Yes.

14 Q What was the term of that loan, sir, do you re-
15 call?

16 A I seem to recall three years.

17 Q And that would have taken you from 1971, Septem-
18 ber, to 1974, is that correct?

19 A Correct.

20 Q Now, sir, do you recall whether periodic payments
21 were made in reduction of that corporate loan?

22 A No.

23 THE COURT: No, they were not made or no, you
24 don't recall?

25 THE WITNESS: No, they were not made.

0000279

1
2 Q When was the first of the payments made on the
3 corporate loan if any were made, sir?

4 A Well, there were none made until the take-out
5 by the other bank.

6 Q That is, by the Chemical Bank you mean, sir?

7 A Yes.

8 Q And that was the latter part of 1975, sir?

9 A Yes.

10 Q And that is your best recollection?

11 A That is my best recollection.

12 Q Did you monitor the corporate loans, sir?

13 A Yes.

14 Q Isn't it a fact, Mr. Baggott, that by mid 1973,
15 the corporate loan had been paid down to \$500,000?

16 A I would have to check my file on that.

17 Q What is your best recollection, sir? You have
18 been testifying from recollection.

19 A The corporation --

20 Q Can you answer my question?

21 A Begging pardon?

22 Q Can you give me your best recollection as to my
23 question, sir?

24 Would you like to have it reread?

25 A NO, I heard the question.

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THE COURT: Was it cut down to \$500,000? That is the question.

THE WITNESS: On balance, I would have to say no.

Q You are testifying from your recollection?

A Yes.

Q And you have testified a great deal from your recollection, is that correct?

A Yes.

Q Isn't it the fact, sir, in mid-July 1973 that there were certain CD's that Parklane, the corporation had at Bankers Trust?

A Yes.

Q Do you recall the amount of the CD's in mid-1973?

A I don't recall exactly but at times they got to be substantial.

Q Can you give us an approximate figure which would fit your characterization of substance, sir?

A I would have to recall something anywhere from five to \$800,000. Possibly more.

Q Do you recall, sir, whether at any time during the tenure of the corporate loan you increased the amount of the loan?

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rkjb 4

A On balance, no, subject to correction.

Q When you say on balance, you are telling us
your best recollection?

A Yes.

Q And you are giving us your best recollection the
same way you have otherwise testified as to your best
recollection?

A Yes.

MR. GARMANSKY: Objection.

Why do you have to keep going --

THE COURT: Yes.

Please sit down.

Q Do you have any recollection at any time during
the period of the corporate loan having increased that loan
by the sum of \$250,000?

A I am inclined on balance to say no, but it's a
definitely grey area in my mind. I wouldn't bet either
way.

THE COURT: You don't have a clear recollection?

THE WITNESS: No.

THE COURT: All right.

Were you requested by anybody to go through the
corporate loan file before you came down here?

THE WITNESS: No.

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2 THE COURT: Tell me, Mr. Baggott, if there is a
3 decrease in the outstanding amount of the loan, is some
4 kind of a receipt given to the person or entity decreas-
5 ing the outstanding loan?

6 THE WITNESS: Yes, there is an advice given.

7 THE COURT: If there is an increase in an out-
8 standing loan, is there some kind of document given to the
9 person or entity increasing the loan?

10 THE WITNESS: Yes, there would be an advice on
11 that also.

12 Q Now, sir, do you recall what the interest rate
13 was on the corporate loan?

14 A As I recall, it was 2 points over prime floating.

15 Q Do you recall what it was in mid 1973?

16 A No, I don't.

17 Q Is it your best recollection it was a floating
18 rate?

19 THE COURT: That is what he said.

20 MR. PARKER: I was inquiring whether that was
21 his best recollection.

22 Q Do you recall, sir, whether in mid 1973 you in-
23 creased the loan, the corporate loan to Parklane and issu-
24 ing CD's for the amount of the increase of the loan to
25 Parklane?

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rkjb 6

A My recollection is grey in area of possible increase. In the area of CD's, my recollection is they were generated out of the cash flow of the corporation.

THE COURT: Do you generally make a loan to an entity then turn around and put them in CD's in your own bank?

THE WITNESS: No.

THE COURT: Would that be considered somewhat unusual?

THE WITNESS: Yes.

THE COURT: I would think so.

MR. PARKER: May I mark Defendant's Exhibit B?

(Defendant's Exhibit B marked for identification.)

Q Sir, I show you Defendant's Exhibit B which purports to be a letter from Herbert N. Somekh to Thomas E. Baggott, Bankers Trust Company dated July 31, 1973 and ask you whether you received that letter of which that is a copy on or about the date which it bears?

A Yes.

MR. PARKER: Your Honor, I offer that in evidence as Defendant's Exhibit B.

MR. GARMANSKY: I object to the offer in evidence on the grounds of relevancy. It's dated July 31, 1973.

0000284

1 It has nothing to do with the issues broughtout on the
2 direct examination of Mr. Baggott and it has absolutely
3 nothing to do with any allegations in the complaint.
4

5 THE COURT: Let me look at it.

6 (Pause.)

7 MR. PARKER: I am prepared to be heard.

8 THE COURT: You don't have to be.

9 Mark it in evidence.

10 (Plaintiff's Exhibit B received in evidence.)

11 THE WITNESS: Your Honor, can I comment?

12 THE COURT: Don't worry about it. We will get
13 around to it.

14 THE WITNESS: Not that.

15 Q According to that letter, the CD's would have
16 risen in amount from 700 to \$950,000, is that correct?

17 A Yes.

18 Q Do you recall whether that amount increased at
19 any time thereafter?

20 A I don't recall.

21 Q Now, sir, you recall having testified to a
22 security package of Mr. and Mrs. Somekh's assets in re-
23 spect of the personal loan?

24 A Yes.

25 Q That was the security package to which you looked

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1 in the event there was to be repayment of the loan, is
2 that not so?

3
4 A Yes.

5 Q Do you recall, sir, when you were examined by
6 Mr. Garmansky, I believe it was, having been asked the
7 following question and giving the following answer?

8 I am referring to page 40.

9 MR. GARMANSKY: What line?

10 MR. PARKER: Starting at line 11.

11 "Q Other than the sale of the Rite-Aid mortgage
12 and obtaining a mortgage on his home, did you have any
13 discussions with Mr. Somekh after June of 1974 as to any
14 plans he had to do anything else to reduce the loan?

15 "A I don't recall. I don't think so. We knew
16 what our security package was and the availabilities and
17 that was what we felt the repayment when, as and if,
18 would come from."

19 Q Do you recall having been asked that question and
20 giving that answer?

21 A Yes, sir.

22 Q Now, sir, you first began discussing with Mr.
23 Somekh the sale of the Rite-Aid mortgage in the spring of
24 1974, is that right, sir?

25 A I don't recall exactly whether it was before or

0000286

after.

Q In any event, there was a lapse of several months, was there not, before the transaction closed?

A Yes.

Q Do you recall the reason for the lapse of several months before the transaction did close?

MR. GARMANSKY: I object to the form of the question. May I have a specific time period, what is meant by several months.

THE COURT: I will take it. Do you know what the reason was?

A I recall two things. One, he had to find a market, a buyer for the instrument and after he did, there was a long time involved in getting the Rite-Aid people, I would say, to agree or go along and then there was a period involved where there was missing documentation.

The relationship of Parklane and Herbert Somekh came to us from the Franklin National Bank and in connection with it, obtaining the actual documentation there were some slip ups and as I recall, there was a fairer number of weeks or months involved until Mr. Somekh's attorney got the actual documentation on the Rite-Aid note making the property to pass the sale.

That is my best recollection.

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Q Do you know whether the documentation had been in the hands of Bankers Trust and misplaced at Bankers Trust?

A That was the general feeling. It was either misplaced at Bankers Trust or mishandled at the former bank.

Q Do you know how many months of delay that was because of the absence of the necessary document?

A I don't recall exactly but it was a fair period of time.

Q On your direct examination, you indicated some uncertainty as to the time when you first learned that Parklane was on a course of going private.

MR. GARMANSKY: Objection. The record will speak for itself.

Q Did you?

MR. PARKER: I will put the question directly.

THE COURT: Reframe the question.

Q Sir, you testified, did you not, you were informed at a point in time that Parklane was changing from its public to its private status, is that not so?

A Yes.

Q Do you recall when you were so informed?

A Yes. I believe it was in the middle part of,

1 I believe, June of that year. That is my area of thinking
2 right now. June. It could be July.

3 Q Do you recall the testimony you gave on your
4 direct examination in that regard, sir?

5 A Well, the thing I recall about the --

6 Q Do you recall? I don't mean to interrupt you
7 but do you recall the testimony you gave on your direct
8 examination as to the time when you recall having been
9 told or being informed that Parklane was going to change
10 from a public to private status?

11 A Yes.

12 Q And what testimony do you recall you gave?

13 A I recall being told that it was a fait accompli
14 and that that was going to be done.

15 Q When were you so informed, sir?

16 A I believe it was in June.

17 Q Do you recall what you testified to in that
18 regard on your direct examination?

19 A You mean the exact language I used?

20 Q The time, the months you used on your direct
21 examination.

22 A I believe June or August. I am not clear on
23 that.

24 Q June or August?

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rkjb 12

A Yes.

Q Do you recall, sir, on the occasion of your interrogation by Mr. Garmansky, I believe, being asked the following question and giving the following answer?

MR. GARMANSKY: The page, please?

MR. PARKER: 43, line 20 or 21.

"Q Would you please tell me when this first was discussed to your best recollection?

"A My best recollection is sometime August it was -- we were told what they, the company and professionals around the company were planning to d."

Q Do you recall having given that testimony?

A Yes.

Q Is it your best recollection that it was August or June?

A Well, it was June or August. I couldn't identify -- I am inclined to think the first information was June, the first advice.

MR. GARMANSKY: Your Honor, on the reading of the transcript, it's not clear from the question what is referred to. May we read in several questions above that in order to make it clear?

MR. PARKER: I am just looking for the date, your Honor.

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rkjb 13

Baggott - cross

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THE COURT: Don't worry about it, I got the picture.

Q Do you know when it was that Parklane did change from its public to its private status, Mr. Baggott?

A I don't recall the exact date.

(Continued on next page.)

0000291

Q Do you recall the month, sir?

A No.

Q Prior to October, 1974 had you been told by anyone representing Parklane of any specific real estate that might be sold after the company had changed from public to private?

A Sold to the company?

Q Any specific piece of real estate that would be sold.

A Yes.

Q And this is prior to October, 1974?

A I can't pinpoint the date.

Q All right, sir, let's see if we can help. Let me ask you, Mr. Baggott, in order for -- Parklane, during the period of its loan with Bankers Trust, was required to obtain the consent of Bankers Trust in order to acquire any parcels of real estate?

A Parklane would have been required to get our permission.

Q Did Bankers Trust grant any such permission in respect of any acquisition by Parklane of any real estate prior to November of 1974, sir?

A Real estate-wise, you are talking about land and building?

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Q Yes.

A I don't recall any land and building.

Q You don't recall any consent having been given
by Bankers Trust, is that correct, prior to October,
1974, is that right?

A With respect to land and building?

Q Yes.

A I don't recall land and building, no.

THE COURT: How about land alone?

THE WITNESS: No.

THE COURT: Leases?

THE WITNESS: I recall waivers concerning pur-
chase of other businesses which did not, as I recall,
involve land and buildings.

Q Isn't it a fact that it wasn't until late
November, 1974 that Bankers Trust was apprised of the
possibilities of what might be sold to Parklane in the form
of real estate to Parklane?

A Yes.

MR. PARKER: I will mark as Defendant's Exhibit
C for identification what purports to be a letter dated
November 29, 1974 from Herbert Somekh to Mr. Steve Fried,
Bankers Trust Company.

(Defendant's Exhibit C was marked for identifi-
cation.)

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lhjb 3

(ause.)

Q You recall, sir, do you not, that that letter was received on or about November 29, 1974 by Bankers Trust Company?

A I would have to say so. It was not addressed to me.

Q You would normally see letters covering the Park-lane account that came to your colleague? You told us before.

A Yes.

MR. PARKER: I offer Defendant's Exhibit C in evidence.

MR. GARMANSKY: No objection.

THE COURT: How many more documents do you have? (Defendant's Exhibit C was received in evidence.)

THE COURT: I see you have a handful. Let's take a break. You pre-mark those exhibits. Tell me, before we take the break, two things I'd like to know.

There were a number of questions about interest being paid by Mr. Somekh, payments received on various obligations, and so on and so forth. Were any of those used to reduce his personal loan?

THE WITNESS: No. Not that I recall.

THE COURT: How about the CD's in the corporate

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lhjb 4
Baggott - cross

1 name? During the period that the corporation was a public
2 company, would they be considered by Bankers Trust as
3 security for the personal loan?
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5 THE WITNESS: No, sir.

6 THE COURT: Okay. Take ten.

7 (Recess.)

8 MR. PARKER: May I proceed, your Honor?

9 THE COURT: Please do.

10 Q Mr. Baggott, I show you Exhibit D for identifi-
11 cation and I ask you if you can identify that exhibit as
12 the loan agreement between Parklane Hosiery Company, Inc.
13 and Bankers Trust Company, dated as of September 27,
14 1971, which covered the \$750,000 loan?

15 A Yes.

16 Q Sir, can you tell us whether the \$750,000 loan
17 had a fixed interest rate or whether it was a floating
18 rate, as you testified on direct examination, sir?

19 THE COURT: Check the documents.

20 Q Page 2 may help you, sir.

21 A Fixed rate, according to this.

22 Q It was not a floating rate, was it, sir?

23 A No, sir.

24 THE COURT: What was the fixed rate?

25 THE WITNESS: 9 per cent.

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2 MR. PARKER: I have no further questions, your
3 Honor.

4 THE COURT: Okay.

5 MR. GARMANSKY: Are you going to offer it in
6 evidence?

7 THE COURT: Do you want to offer it?

8 MR. PARKER: I think the witness has provided
9 what the record required, your Honor.

10 MR. GARMANSKY: Your Honor, may I have just one
11 moment, please?

12 THE COURT: Sure.

13 (Pause.)

14 THE COURT: Tell me while we are waiting, Mr.
15 Baggott, when was that loan repaid?

16 THE WITNESS: December of '75.

17 THE COURT: You were pretty glad to get rid of
18 it? 9 per cent rate.

19 THE WITNESS: The rate was not 9 per cent at
20 the time. The rate was adjusted a short time after the
21 initial loan was made, and that was why there was a
22 grey area of confusion as to the exact rate. To answer
23 your first question, we don't like to lose any business.

24 THE COURT: Sure.

25 MR. GARMANSKY: Your Honor, we just have a few

0000296

1 questions, possibly two, on redirect.

2 REDIRECT EXAMINATION

3 BY MS. LIEBHARDT:

4 Q Mr. Baggott, I'd like to read from testimony
5 that you purportedly gave to the Securities and Exchange
6 Commission on November 6, 1975.

7 MR. PARKER: Objection, your Honor.

8 THE COURT: Let's see where it is going.

9 Q Page 43, line 11 -- Mr. Baggott, do you recall
10 testifying at the Securities and Exchange Commission in
11 or around November of 1975?

12 A Yes.

13 Q Do you recall being asked these questions and
14 giving these answers:

15 "Q Any other method, forgetting about the Rite-Aid
16 mortgage now and the mortgage on his home, after June of
17 1974, did Mr. Somekh ever inform you of any other plans
18 that he had to further reduce the loan?

19 "A Yes. That brought up the area of -- of going
20 private and putting the package all together in to Park-
21 lane, and having it offer all obligations, corporate and
22 personal, paid out of Parklane."

23 A You want a yes or no answer?

24 THE COURT: Yes. Do you recall giving that

25 0000297

1 testimony?

2 THE WITNESS: Yes.

3 Q Mr. Baggott, you testified that you had discussions
4 with Mr. Somekh about the Rite-Aid mortgage and a mortgage
5 on his home, is that correct?
6

7 A Yes.

8 Q Would Bankers Trust have been satisfied with
9 Mr. Somekh selling off the Rite-Aid mortgage and his home
10 and leaving it at those two items of property?

11 MR. PARKER: Objection, your Honor.

12 Q In order to reduce his loan.

13 THE COURT: I will let it stand.

14 MR. PARKER: I think it is hypothetical, it is
15 speculative.

16 THE COURT: I understand. I will let it stand.

17 MR. PARKER: I think it is really prejudicial,
18 your Honor, that kind of question.

19 THE COURT: Most probative evidence on one side
20 or the other is prejudicial.

21 I think unduly, sir, and that's why I entered
22 the objection.

23 THE COURT: No, I will let it go. Answer the
24 question. If he sold off the Rite-Aid mortgage and re-
25 mortgaged his home, would you be satisfied to take that

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1 lhjb 8 Baggott - redirect/recross 264
2 in connection with his personal loan?

3 THE WITNESS: Not enough, no. No.

4 MS. LIEBHARDT: Thank you, Mr. Baggott. Your
5 Honor, I have no further questions.

6 MR. PARKER: I'd just like to raise one point
7 here, your Honor.

8 XXX RECROSS EXAMINATION

9 BY MR. PARKER:

10 Q In respect to the question and answer that Ms.
11 Liebhardt read from page 43 of the transcript, following
12 that question and answer, you testified as follows, did
13 you not:

14 "Q Would you please tell me when this first was
15 discussed, to your best recollection?

16 "A My best recollection is sometime in August."
17 Do you recall having so testified?

18 MR. GARMANSKY: Would you finish the answer?

19 Q "-- we were told what they, the company and
20 the professionals around the company, were planning to
21 do." That was already in the record.

22 THE COURT: Okay.

23 Q That followed the question that Ms. Liebhardt
24 had read to you, isn't that so?

25 A Apparently, yes.

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2 MR. PARKER: Thank you, your Honor.

3 THE COURT: Step down. How was your trip yester-
4 day? Successful, I hope?

5 THE WITNESS: No.

6 THE COURT: Can't win them all.

7 (Witness excused.)

8 THE COURT: Mr. Somekh, get back on the stand.

9 MR. PARKER: If your Honor please, I understood
10 that Mr. Garmansky had completed his examination.

11 THE COURT: Yes. That's what he said. That is
12 why I took Mr. Baggott, in order to let him go. You have
13 no cross examination?

14 MR. PARKER: I was not going to cross examine
15 him. I was going to reserve my right for my case, your
16 Honor.

17 THE COURT: You can call him again on your case.
18 Sure. Go sit down. Who is your next witness?

19 (Continued on next page.)
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1 lhmch

Russ-direct

2 MR. GARMANSKY: We have Mr. Peter Russ, our
3 next witness. We will go out and get him.

4 P E T E R A. R U S S, called as
5 a witness on behalf of the plaintiff, being first
6 duly sworn, testified as follows:

7 THE COURT: Mr. Russ, this is a very large
8 courtroom. You have to keep your voice up. Sit back and
9 relax. Nobody is going to bite you.

10 Okay?

11 THE WITNESS: Okay.

12 DIRECT EXAMINATION

13 BY MR. ORMSTEN:

14 Q What do you do for a living, Mr. Russ?

15 A Currently I am self-employed as a financial
16 consultant, financial corporate consultant, for several
17 smaller companies in the Midwest.

18 Q Would you briefly describe your duties to the
19 Court?

20 A In that capacity I am trying to arrange --
21 offer advice about the arrangement of balance sheet
22 structure, the type of financing alternatives available
23 to these companies, and potential areas that they may
24 market, the types of financings that are available to
25 them.

0000301

1 2 lhmch

Russ-direct

2 Q Have you ever been employed by an investment
3 banking firm?

4 A Yes, I have.

5 Q By whom?

6 A I was employed by Thomson & McKinnon,
7 Auchincloss, Kohlmeyer and one of its predecessor firms.

8 Q When did that employment start?

9 A January 1, 1969.

10 Q When did it conclude?

11 A December 31, 1975.

12 Q What was your position when you started?

13 A I was an associate in the corporate financial
14 department of Auchincloss, Kohlmeyer.

15 Q When you concluded?

16 A I was vice-president in the corporate financial
17 department of Thomson & McKinnon.

18 Q Did you ever hear of a company called Parklane
19 Hosiery?

20 A Yes.

21 Q Did you ever hear of an individual, or meet
22 an individual named Herbert Somekh?

23 A Yes, I have.

24 Q Did there ever come a time when you learned
25 that Parklane was going to go from a public to a private

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1 3 lhmch

Russ-direct

2 status?

3 A Yes, there was.

4 Q Would you please tell the Court approximately
5 when that was?

6 A It was after May 24th of 1974, and sometime
7 before August 6, 1974.

8 Q Did there ever come a time when you were
9 retained to do an appraisal of the value of the stock of
10 Parklane Hosiery?

11 A Yes, there was.

12 Q Would you tell the Court approximately when
13 that was?

14 A It was on approximately August 12, 1974.

15 Q Did you in fact make such an evaluation?

16 A Yes, we did.

17 Q Did you submit such an evaluation to Parklane?

18 A Yes, we did.

19 Q When did you submit it?

20 A I submitted it on September 3rd, but the
21 appraisal was dated August 29, 1974.

22 Q In the course of preparing that appraisal,
23 did you consult certain financial data and speak to certain
24 individuals?

25 A Yes, I did.

0000303

4 lhmch

Russ-direct

Q Would you tell the Court briefly what financial data you reviewed and looked at?

A We looked at the annual reports for the Parklane Hosiery Company, since it had been a public company; we looked at the latest 10-K that had been filed by the Parklane Hosiery Company; we looked at 11-month internal operating results for the company, and reviewed with the company its budget for that fiscal year and its budget for -- this was a verbal discussion -- its budget for fiscal 1975.

Q You say a verbal discussion.

Would you briefly state for the Court the individuals to whom you spoke in connection with this matter?

A Mr. Herbert Somekh, Parklane Hosiery Company, and Mr. Nate Lubow, a partner in Clarence, Rainess & Company.

Q Would your appraisal of the company's stock evaluation have been -- would it have been different had you known that \$1 million in assets of the corporation would have been used to pay for an officer's personal indebtedness?

MR. PARKER: Objection, your Honor.

THE COURT: Let's find out what his appraisal was first, what it was based on, and then we will go into

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1 5 lhmch

Russ-direct

2 that.

3 What was your appraisal?

4 THE WITNESS: Pardon me?

5 THE COURT: What was your appraisal?

6 THE WITNESS: The dollar price?

7 THE COURT: Yes.

8 THE WITNESS: The dollar price was \$1.78 per
9 share.

10 THE COURT: This was delivered on September 3rd?

11 THE WITNESS: September 3rd, that's correct.

12 THE COURT: What was the basis?

13 THE WITNESS: It was based on several techniques
14 that Thomson had used both in evaluating other companies
15 for public offerings, and specific techniques that I had
16 been informed and my partners had been informed to use in
17 preparing this type of appraisal.

18 THE COURT: Wait a second.

19 Who informed you of this?

20 THE WITNESS: Our counsel, the legal counsel
21 for Thomson, McKinnon.

22 Do you want the specifics?

23 THE COURT: Yes.

24 THE WITNESS: There were three basic techniques
25 that we used. One was an evaluation of the assets that

6 lhmch

Russ-direct

the Parklane Hosiery -- the net worth and assets of the company and what we could reasonably -- what those assets were reasonably worth.

The second appraisal technique was to evaluate future earnings and try and place a multiple on those earnings based upon the future of Parklane's business and based upon the future projections and impressions that analysts had concerning the retailing -- especially the retailing industry per se.

And the third technique was more or less a confirmation technique where we evaluated the cash flow potentation of Parklane and tried to reasonably confirm that the cash flow that the company could reasonably be expected to produce over three years would in fact support the earnings projections and capital expansion projection and asset base that the company was reporting at that time.

THE COURT: Go ahead.

BY MR. ORMSTEN:

Q Mr. Russ, did you know at the time you applied your various techniques that approximately \$1 million in corporate assets were to be used by Mr. Somekh to reduce his personal indebtedness?

MR. PARKER: Objection, your Honor.

THE COURT: I will permit it.

0000306

Go ahead.

MR. PARKER: I'd like to be heard, if you will permit me.

THE COURT: Sure.

MR. PARKER: I think it is hypothetical, speculative, it is not supported by the record, and there is no foundation laid in this record to permit such a question to be asked. It is not probative of anything.

THE COURT: I will permit it.

Go ahead. Answer it.

THE WITNESS: Could you repeat the question, please?

(Record read)

A No, I was not aware of that.

Q If you had known that fact, would your appraisal have differed in any way?

MR. PARKER: Objection, your Honor.

THE COURT: No, I will permit it.

A Yes, I would imagine it would.

Q In what respect?

MR. PARKER: If your Honor please, the witness said he imagines it would. I don't think that's entitled to another question.

THE COURT: All right, let me redo it.

0000307

At the time that you made this appraisal, did you realize that as soon as the company went private, some of its assets would be tied up in land?

THE WITNESS: No.

THE COURT: Would that have affected your appraisal?

THE WITNESS: The answer is yes, it would have affected the appraisal.

THE COURT: You appraised the corporation solely in the specialty retail area?

THE WITNESS: Yes. We appraised the company solely in the specialty retail area.

THE COURT: Did that have anything to do with land speculation and buildings?

THE WITNESS: To the extent that the company leased most of its property, it had something to do with land, but basically this was marketing of specialty --

THE COURT: No. My question was, did it have anything to do with land speculation and building?

THE WITNESS: Oh, no. No.

Q If you had known the fact concerning the use of the assets, would you have made further inquiry?

A Yes, we would have.

Q By further inquiry, you mean what, Mr. Russ?

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1 A We would have asked for the financial statements
2 of the situations that would have been merged into the
3 company and tried to evaluate its earnings capability as
4 a part of the Parklane Hosiery Company.
5

6 Q Is it your testimony now, Mr. Russ, that you
7 never saw such financial information?

8 A That's correct.

9 Q At the time that you performed your appraisal,
10 were you aware that the company was engaged in real
11 estate negotiations aimed at netting the company
12 approximately \$300,000?

13 MR. PARKER: Objection.

14 THE COURT: Specify much better than that.

15 MR. ORMSTEN: Withdrawn.

16 Q At the time you performed your appraisal,
17 did you know that the company was negotiating for the
18 cancellation of its leasehold in Nassau Street, New York?

19 A No, I did not.

20 Q At the time you performed your appraisal,
21 were you told of any prices or financial terms of such
22 negotiations?

23 A No, I was not.

24 Q Were you ever specifically told what, if any,
25 sums would accrue to the company if such negotiations were

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consummated?

A No.

Q Did Mr. Somekh or anyone ever tell you that \$300,000 would be netted from such a transaction?

MR. PARKER: Objection, your Honor. There is no such thing in the record.

THE COURT: No, I will permit it.

A No.

THE COURT: Or even that there was such a possibility?

THE WITNESS: No.

Q Had you know that fact, would it have affected your appraisal?

A To the extent that any increase in -- yes. The answer is yes.

THE COURT: To the extent that any increase in the cash flow would; is that correct?

THE WITNESS: That's correct.

THE COURT: But nothing else?

THE WITNESS: Nothing else, correct.

THE COURT: That's what I thought.

(Continued on next page)

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Russ-direct/cross

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2 Q Would it have prompted further inquiry on
3 your part?

4 A Yes, it would have prompted further inquiry.

5 Q Could you expand briefly for the Court as
6 to what you would have done by way of further inquiry?

7 A Well, at the time Mr. Somekh had indicated
8 there were a number of troublesome leases that the
9 company had, and I would have been curious as to how the
10 company would have applied these funds, either renegotiating
11 some unfavorable leases or taking the penalties that would
12 have accrued, would have had to be paid to get out of
13 some unfavorable leases, and to the extent this might have
14 affected earnings it would have been taken into
15 consideration.

16 MR. ORMSTEIN: No further questions of this
17 witness at this time.

18 CROSS-EXAMINATION

19 B MR. PARKER:

20 Q Mr. Russ, if the prospect of the realization
21 of \$300,000 that Mr. Ormsten referred to was conjecture,
22 would that have made a difference as against the likelihood
23 of it having happened?

24 A es.

25 Q What would that difference be, sir?

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2 A The difference was that I, specifically, and
3 my firm had given me guidelines to try to deal with as
4 many of the events as we could reasonably predict. We
5 tried to stick to that parochial view.

6 We were evaluating events we could predict
7 and conjecture and speculation about either external events
8 or even internal events that we could not put a firm
9 reason to expect it to occur, we did not evaluate.

10 Q Sir, the Court inquired about the effect of
11 the acquisition of land or real estate on cash flow.

12 If you were aware, sir, that cash flow would
13 be used in respect of an investment in real estate,
14 how would that have affected your appraisal, sir?

15 A It could have affected it -- it would really
16 depend upon the fact of the situation. If the investment
17 in the assets were producing more cash flow and more
18 earnings, it possibly could have enhanced the evaluation.

19 If, on the other hand, the use of the cash
20 flow were to show up an investment that was draining cash
21 and was in an area where there wasn't much likelihood of
22 the real estate regaining its economic viability, then it
23 could have just as easily negatively affected the appraisal.

24 Q Take the situation that Mr. Ormsten put to
25 you in which he postulated the tying up of a million

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1 dollars of cash flow in real estate.

2 How would that affect your appraisal, sir?

3 A The appraisal letter states that, in our
4 opinion, the single strongest asset of the Parklane
5 Hosiery Company was its ability to generate cash. The
6 diminution of that ability would have adversely affected
7 our appraisal.
8

9 Q So that the appraisal of \$1.78 would have been
10 less?

11 A Given that set of circumstances, yes.

12 Q Sir, isn't it the fact that during the course
13 of the work you were doing in respect of your appraisal
14 that the subject of cash flow and real estate operations
15 was mentioned to you, sir?

16 A Yes, it was mentioned.

17 Q Do you recall, sir, having been asked these
18 questions and giving these answers when you were examined
19 by the SEC in the course of its investigation, sir:

20 "Q What did he tell you, generally?

21 "A He had some notions that if -- if he could
22 develop -- if he could use the cash flow of Parklane,
23 he might merge some of his real estate operations into the
24 company after it went private."

25 Do you recall saying that?

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1 A I recall saying that, yes.

2 Q Do you know whether there was one appraisal or
3 more than one appraisal made at or about the time that
4 Thomson, McKinnon made its appraisal?
5

6 A There was more than one appraisal made.

7 Q How many appraisals were made?

8 A There were two appraisals made.

9 Q And you were aware of the fact that another
10 appraisal was going to be made?

11 A Yes, sir.

12 Q How did that come to your attention, sir?

13 A At a meeting with Mr. Somekh, he indicated
14 that the law firm that he had retained for this transaction
15 was asking him to have more than one appraisal, specifically
16 two appraisals.

17 Q Did Thomson, McKinnon express itself in respect
18 of the proposal that there be two appraisals?

19 A Yes, we did.

20 Q What was the Thomson, McKinnon position in
21 respect of the two appraisals that were to be made?

22 A Our position was that if the appraisals, and
23 including our appraisal were to be used, that the higher
24 of the two appraisals -- at least the higher price of the
25 two appraisals be used as the offering price to the public

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2 to effect a transaction.

3 Q Sir, do you know what the appraisal amount
4 was in respect to the second of the two appraisals?

5 A I don't remember the specific amount, but I
6 remember it was between \$1.35 and \$1.40.

7 Q So it was lower than the Thomson, McKinnon
8 appraisal of \$1.78?

9 A That is correct.

10 Q Do you know whether the offering price to
11 public shareholders was greater than \$1.78, which was
12 the value appraised by Thomson, McKinnon?

13 A Yes, I do know that.

14 THE COURT: It was \$2.00, wasn't it?

15 THE WITNESS: That is correct.

16 Q Had Thomson, McKinnon or a predecessor of
17 Thomson, McKinnon been involved in the transaction when
18 Parklane went public?

19 A Yes, it did.

20 Q Who was it that was involved that you are
21 referring to in the transaction when Parklane went public?

22 A It was a firm by the name of Auchincloss,
23 Parker, Redpath.

24 THE COURT: That was a predecessor of Thomson,

25 McKinnon?
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1 THE WITNESS: Yes.

2
3 Q And it was merged with Thomson, McKinnon,
4 was it?

5 A Yes, it was.

6 Q Had you ever been with Auchincloss & Redpath?

7 A Yes, I began work at that firm.

8 Q When the two firms were merged, you moved into
9 the merged firm, did you?

10 A That is correct.

11 Q Do you recall when it was that the discussions
12 were first had and the proposal was made, or the request
13 was made that Thomson, McKinnon perform an appraisal in
14 1974 with respect to Parklane shares?

15 A Are you referring to a specific date?

16 Q Month. I think you indicated August, did you
17 not?

18 A It was some time -- as I said, it was some
19 time after May 24th and some time before August 6th.

20 If I remember correctly, it was some time in
21 late July.

22 Q At that time did Thomson, McKinnon deliberate
23 the question as to whether it should or should not make
24 an appraisal?

25 A That is correct. 0000316

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2 Q Thomson, McKinnon, after deliberating the
3 question, decided it would make the appraisal, is that
4 not so?

5 A That is correct.

6 Q Did the fact that Thomson, McKinnon or its
7 predecessor, Auchincloss, Parker & Redpath, be involved
8 in the transaction when Parklane went from public to a
9 private status have any effect on the decision made by
10 Thomson, McKinnon to make the appraisal in 1974?

11 A Yes, it did.

12 Q What was that, sir?

13 A When we were made aware that Mr. Somekh was
14 definitely taking his company private, we felt that we
15 were the people, since we, Auchincloss, Parker & Redpath,
16 had been the firm to take Parklane public, we wanted to be
17 the firm that would evaluate its worth to go private.

18 We still had many shareholders -- not many.
19 We still had several shareholders who had held the stock
20 from its initial public offering and we wanted to protect
21 their interests as best we could.

22 Q And that was a consideration in Thomson,
23 McKinnon deciding to make that appraisal?

24 A Yes, it was.

25 MR. PARKER: No further questions.

0000317

REDIRECT EXAMINATION

BY MR. ORMSTEN:

Q Mr. Russ, in your testimony on cross-examination you referred to the fact that your firm or its predecessor had been instrumental in bringing Parklane public; is that correct?

A That is correct.

Q And you also, in response to the Court's question, referred to an offering price.

There was an offering price in connection with the going private; is that right?

A Yes.

Q And there was also an offering price in connection with going public?

A That is correct.

Q What was the offering price when the company went public?

A I believe it was \$9 a share.

MR. ORMSTEIN: No other questions, your Honor.

MR. PARKER: Just one more question.

RECROSS-EXAMINATION

BY MR. PARKER:

Q Mr. Russ, at the time that Thomson, McKinnon made its appraisal in 1974, it was fully aware of the fact,

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Russ-recross

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was it not, that there had been a higher offering price when the company went public?

A Absolutely.

Q Can you tell us, sir, whether during the period from the time the company went public until the time it changed to a private status, Thomson, McKinnon monitored the operations in some respect of Parklane?

A Yes, we had.

THE COURT: "Monitored" is a strange word.

Let me ask: Did you keep up to date research and recommendations on Parklane Hosiery from the time it went public until the time it went private?

THE WITNESS: We kept up to date periodically meeting with the company, keeping abreast of their financial statements, and following the price rise and fall of the common stock over the period it was a public company, yes.

THE COURT: That is what you meant by

"monitoring"?

THE WITNESS: Yes.

MR. PARKER: Thank you, your Honor.

THE COURT: You may leave.

(Witness excused)

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THE COURT: Call your next witness.

R I C H A R D D. T U N I C K, called as a
witness on behalf of the plaintiff, after being
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARMANSKY:

Q Mr. Tunick, where are you employed?

A I am employed at National Bank of North
America, 44 Wall Street, New York.

Q What is your position there, sir?

A I am an assistant vice president.

Q Would you briefly describe your duties?

A I am in the corporate finance department. I
am a loan officer. I am in charge of mining group, among
other responsibilities.

Q Are you familiar with an individual by the name
of Herbert Somekh?

A Yes.

Q Would you briefly describe the facts and cir-
cumstances under which you became familiar with Mr.
Somekh?

A After I joined National Bank of North America,
I signed a number of loans. Among one was 433 JV which
was a joint venture, partnership in which Mr. Somekh was

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one of four principals.

Q Was there an outstanding loan by Mr. Somekh to the bank?

THE COURT: From the bank to Mr. Somekh.

MR. GARMANSKY: I am sorry, your Honor.

THE COURT: He wants to know whether the bank ever lent Mr. Somekh any money.

A The bank had made a loan to this partnership. Not directly to Mr. Somekh.

Q Did Mr. Somekh guarantee the loan?

A He was one of four guarantors of the loan, yes. All of the joint venturers had guaranteed the loan.

Q Did you ever have any conversations with Mr. Somekh concerning this loan?

A I had several conversations with him over the phone and also in person.

Q What did you say to him, what did he say to you on your phone conversations?

MR. PARKER: Can we fix a time for this?

THE COURT: Do you recall when these were?

THE WITNESS: I believe the conversations took place during the period of 1974. They are reflected in various memos and copies of letters which appear in the bank's records.

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2 Q What was discussed between you and Mr. Somekh?

3 A The substance of all the conversations --

4 MR. PARKER: Can we be more specific than 1974?

5 THE COURT: Hopefully we will get to the memos.

6 Show him the first memo if you have it.

7 Q Do you recognize Plaintiff's Exhibit 18 marked
8 for identification?

9 A Yes, I do. It's a letter I wrote on May 15,
10 1974. It was sent to Mr. Somekh by registered mail
11 return receipt requested and the substance of the letter
12 was --

13 THE COURT: Don't tell us the substance.

14 MR. GARMANSKY: Plaintiff offers Exhibit 18 into
15 evidence, your Honor.

16 MR. PARKER: I have seen it and on the same
17 grounds we have previously interposed objections, we
18 object on the grounds it's irrelevant, immaterial to the
19 issues here.

20 THE COURT: Let me see it.

21 (Pause.)

22 THE COURT: Mark it into evidence.

23 XXX

(Plaintiff's Exhibit 18 received in evidence.)

24 Q Did you meet with Mr. Somekh on or about May 18,
25 1974?

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A Yes.

Q Where was this meeting held?

A At my office in the bank.

Q Who was present?

A Present during that meeting was Mr. Somekh, Herbert Strauss, one of the Strauss brothers, who was one of the joint venturers and Nate Lubow who was the Clarence, Rainess partner who handled Mr. Somekh's financial affairs.

Q Would you please tell us what was discussed at that meeting and by who?

A The substance of the meeting was to the effect that the bank had made a loan in late 1970 secured by the stock of various cooperative apartments at 433 East 56th Street, Manhattan; that the loan was to be repaid in a very short period of time from the sale of those apartments; that unfortunately they had not been successful in selling those apartments, but nevertheless the bank had made a loan at a fixed rate of interest and was suffering from the fact that the bank's cost of funds at that time was extremely high and was losing money and as a defense, we told Mr. Somekh we would like the loan to be repaid and the substance of the letter was if he wasn't prepared to repay the loan together with the other principals, we

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would be forced to sue the various guarantors.

Q How much was the loan?

A \$150,000.

Q At this meeting, did Mr. Somekh say anything to you?

A He said that he didn't have the ability to repay the loan because he was extremely illiquid and Mr. Strauss joined in and said the same thing.

MR. GARMANSKY: I would like to mark this document as Plaintiff's Exhibit 35.

(Plaintiff's Exhibit 35 marked for identification.)

Q Mr. Tunick, do you recognize Plaintiff's Exhibit 35?

A Yes, I do.

Q Did you prepare Plaintiff's Exhibit 35?

A Yes. This is a memo which I wrote for the credit file which is part of the bank's permanent record.

Q To what use do you put Plaintiff's Exhibit 35, if any?

A I am sorry, I don't understand your question precisely.

Q After the preparation of Plaintiff's Exhibit 35, have you used it in any respect pertaining to what

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Tunick - direct

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we have discussed today with Mr. Somekh, or 433 JV Corp.?

A Well, as a result --

MR. PARKER: Objection. I don't understand the question.

THE COURT: I am not sure of it, either.

MR. GARMANSKY: I will rephrase the question.

THE COURT: If he can answer it, it's okay.

Q Do you understand the question, Mr. Tunick?

A I would prefer you rephrase the question so I may answer with greater specificity.

Q After preparing Plaintiff's Exhibit 35, it goes into the file of the loan account, is that correct?

A Well, for every account in the bank, we maintain a credit file and when there are loans, every time we meet with or speak with the principals involved with the loan, you record the meeting and the tenor of what occurred.

Q It's a generally conducted business activity of National Bank of North America?

A It's called a contact report.

Q Let me finish the question.

A Yes.

Q Is it a generally conducted business activity of North America, to prepare and preserve such memoranda?

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A Yes.

Q Similar to Plaintiff's Exhibit 35?

A Yes.

Q Since the time you wrote Plaintiff's Exhibit 35, have you used it in any way?

A Well, I would say my only use has been as relates to my appearance here today, that I was served with a subpoena by the SEC to produce certain records as part of the bank's experience with Mr. Somekh as a principal of 433 JV and of the corporation Shemok Limited which refinanced the 433 JV loan and I performed in accordance with the subpoena and made copies of these records and provided them to you gentlemen, I believe on two occasions.

Q Other than the Securities and Exchange Commission, after you prepared Plaintiff's Exhibit 35, did you use it in connection with any business of the bank pertaining to 433 JV Corp.?

MR. PARKER: Objection; asked and answered.

THE COURT: I think it has been.

Let him answer again.

A If I understand your question correctly, was there a subsequent action on my part relative to this meeting --

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MR. GARMANSKY: I will withdraw the question.

Q Mr. Tunick, did you ever review that memorandum, Plaintiff's Exhibit 35 after you wrote it and placed it into the credit file other than the SEC request?

MR. PARKER: Objection.

THE COURT: I will let him answer.

A It's difficult for me to answer that question one way or the other.

Q Did you ever use Plaintiff's Exhibit 35 in preparation of other papers in the credit file?

A That is possible. I cannot recall quite frankly whether in fact there was a direct nexus between this exhibit and subsequent documentation in the file.

As I tried to indicate earlier, there was really no particular change from the point at which I first discussed the matter with Mr. Somekh and his accountant Mr. Lubow and explained that the bank wanted to get repaid. The situation didn't change.

As a consequence, there was no particular need for me to review documents or events. At one point in time I may have referred to a letter I had written at an earlier date and referred to that in a subsequent letter and said we wrote to Mr. Strauss, now we are writing to you, because Mr. Strauss in my opinion had been irresponsible

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Tunick - direct

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1 and not replied and Mr. Somekh was considering redeeming
2 himself to be the responsible partner and acting for the
3 rest of the partners, but as to whether I referred to
4 this particular exhibit, I don't recall.
5

6 MR. GARMANSKY: Plaintiff offers Exhibit 35 for
7 identification pursuant to 803 Section 5 and 803 Section
8 24 of the federal rules.

9 MR. PARKER: Objection.

10 THE COURT: Sustained.

11 I will see you after lunch at 2:00.

12 (Luncheon recess.)
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AFTERNOON SESSION2:27 p.m.

MR. GARMANSKY: Before Mr. Tunick's cross examination, the plaintiff would like to offer into evidence Exhibits 17, 20 and 24.

THE COURT: Let me see them.

MR. PARKER: We stipulated authenticity, but we do object on the grounds of irrelevance and immaterial.

THE COURT: Mark it in evidence.

(Plaintiff's Exhibits 17, 20 and 21 were received in evidence.)

R I C H A R D D. T U N I C K, resumed.

CROSS EXAMINATION

BY MR. PARKER:

Q Mr. Tunick, was the date of the meeting that you testified was held at your office May 26, 1974?

A The date of the meeting was reflected on the memo. If the memo said it was May 26th, then it was May 26th.

Q You don't have any other recollection of any other date, do you?

A Well, I do consider myself to be possessed with a pretty fair memory.

Q The date that you just remembered is --

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1 lhjb
2 A The memos are recorded --

3 Q I am just talking about the date.

4 A The memos are recorded immediately after the
5 meeting. So if that is what is reflected, then it's
6 accurate.

7 Q The loan that you were discussing to this
8 partnership, and the partnership was known as what?

9 A The partnership was known as 433 JV.

10 Q And there were four partners?

11 A There were four partners.

12 Q The amount of the loan outstanding to the partner-
13 ship was how much?

14 A \$150,000.

15 Q The four guarantors guaranteed it jointly and
16 severally, did they?

17 A Yes.

18 Q You testified that you had sent a letter to Mr.
19 Somekh on May 15, 1974, and that letter has been marked
20 as Plaintiff's Exhibit 18 in evidence.

21 Had you communicated prior to May 15, 1974
22 with any of the other partners in the 433 JV partnership?

23 A Yes, I did. I had written to I believe a Mr.
24 Harold Strauss on a date which is reflected in that letter.

25 Q Did you write to him once or more than once?

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1 A Offhand I recall having talked to him on the
2
3 telephone several times and having written once.

4 Q The letter that you wrote to him, according to
5 Defendant's Exhibit 18, was July 13, 1973, is that
6 correct?

7 THE COURT: Why don't you show him the letter,
8 if you have it.

9 A Right, that's correct, sir.

10 Q It was after you had written that letter, sir,
11 that you had the telephone conversations with Mr. Strauss?

12 A Well, I would say I spoke with him both before
13 that letter and subsequent to that letter.

14 Q Did you ever receive a written response to your
15 letter of July 13, 1973?

16 A I believe I received a response from Mr. Somekh.

17 Q Do you recall whether you did or not?

18 A I believe I did. As to the date of that re-
19 sponse, it was basically to the effect that "Let's sit
20 down and talk about it."

21 Q The first time that you met Mr. Somekh was on
22 the occasion of the meeting in May, 1974, is that correct?

23 A That's correct.

24 Q That loan was being carried at what interest
25 rate?

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2 A I think it is recited in the memo, but I believe
3 it was something on the order of 7-1/2 per cent fixed.

4 THE COURT: When was it made?

5 THE WITNESS: The loan was made in December,
6 1970, I believe.

7 Q At what rate was National Bank of North America
8 making loans in May of 1974 to non-corporate borrowers?

9 A Well, to non-corporate borrowers, the rate of
10 interest was governed by the usury laws.

11 Q What was that for this purpose?

12 A I believe it was 7-1/2 per cent.

13 Q Was there a proposal that the borrower become
14 a corporate entity?

15 A I think the request on our part was to have
16 the loan paid. As a means for payment, it was suggested
17 that a corporate vehicle be utilized in order to refinance
18 the loan.

19 Q If a corporate vehicle were to be utilized, the
20 interest rate would go to what, sir?

21 A That would be governed by other usury laws,
22 and I guess it could go as high as 25 per cent.

23 Q Did you discuss any proposed rate of interest
24 to a corporate entity for that loan, sir?

25 A I told Mr. Somekh and the other gentlemen that

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Tunick - cross

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2 I was prepared to charge them as onerous a rate as would
3 legally be permissible in order to impel them to pay the
4 loan in as accelerated fashion as possible.

5 Q And that you would -- at the highest rate that
6 you could charge by law -- you were prepared to carry the
7 loan?

8 A I guess my personal scruples permitted them 5
9 per cent latitude. I thought 20 per cent was a pretty high
10 rate of interest, sufficiently to be onerous and --

11 Q So that loan would be carried at that rate by a
12 corporate vehicle, is that correct?

13 A That's correct. I felt that 20 per cent would
14 compensate the bank for having a loan well under the
15 prime rate for a period of some time.

16 Q That is since the inception of the loan, is that
17 right?

18 A Well, I wouldn't say since the inception of the
19 loan, but as the loan was contemplated to be paid I believe
20 about a year after having been made, and inasmuch as it
21 extended for sometime, it seemed reasonable to provide the
22 bank with basically a break-even return over the entire
23 term of the loan to have it raised to 20 per cent.

24 Q So far as the \$150,000 obligation is concerned,
25 as divided between the four parties, that would have

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amounted to \$57,500 each, would it not?

THE COURT: If you divided it by four, sure.

Q That loan was paid off to the National Bank of North America, was it not?

A The 433 JV loan was repaid through a loan to Shemok, Ltd., which was in fact this corporate vehicle that we were referring to.

Q National Bank of North America had its loan repaid, is that correct?

A Are you referring to the loan to 433JV or to Shemok, Ltd.? They were both repaid.

MR. PARKER: Thank you, your Honor. Thank you, Mr. Tunick.

MR. GARMANSKY: No questions.

THE COURT: All right, step down.

(Witness excused.)

(Continued on next page.)

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Curtiss-direct

2 R O B E R T

S.

C U R T I S S,

3 called as a witness by the plaintiff, being

4 first duly sworn, testified as follows:

5 THE COURT: Mr. Curtiss, do me a favor.

6 Keep your voice up a little higher.

7 Okay?

8 THE WITNESS: Yes, sir.

9 DIRECT EXAMINATION

10 BY MR. ORMSTEN:

11 Q Mr. Curtiss, what do you do for a living?

12 A I am a real estate counselor.

13 Q Are you self-employed?

14 A Yes, I am.

15 Q Prior to being self-employed, were you
16 associated with any company?

17 A Yes. I was chairman of the board of Ely
18 Cruikshank & Company.

19 Q How long have you been in the real estate
20 business?

21 A 49 years this year.

22 Q Did you ever hear of a company known as
23 Parklane Hosiery?

24 A Yes, I did.

25 Q Did you ever hear of an individual known as

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Curtiss-direct

Herbert Somekh?

A Yes, I did.

Q Did you ever enter into negotiations with Parklane concerning a cancellation of a leasehold?

MR. PARKER: Objection as to form.

THE COURT: No, I will permit it.

Go ahead; answer.

A Yes, I did.

Q Did you ever enter into such negotiations with Mr. Somekh?

MR. PARKER: Objection as to form.

THE COURT: No, I will permit it.

Go ahead.

Q The question is did you ever enter into such negotiations with Mr. Somekh?

A Yes, I did.

Q Was it around 1970 or so that you began such negotiations?

A With Mr. Somekh, yes.

Q With Mr. Somekh?

A Yes.

Q On behalf of whom were you negotiating?

A The Federal Reserve Bank of New York.

Q What was the location of the property on which

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1 3 lhmch

Curtiss-direct

2 the lease was held?

3 A The southeast corner of Nassau and John
4 Streets.

5 Q Did you negotiate with Mr. Somekh in 1974?

6 A Yes, I did.

7 Q Was an offer ever made to Parklane on behalf
8 of the Federal Reserve Bank?

9 A Yes, it was.

10 Q In what dollar amount was that offer made?

11 A \$800,000.

12 THE COURT: Did you convey the offer?

13 THE WITNESS: Pardon me?

14 THE COURT: Did you convey the offer?

15 THE WITNESS: Yes, I did, sir.

16 Q Was such an offer ever made or ever outstanding
17 in the year 1974?

18 A Yes, it was.

19 Q Did you ever have personal discussions or
20 meetings with Mr. Somekh in which the leasehold was
21 discussed?

22 A Oh, yes.

23 Q Was a sum of money other than \$800,000 ever
24 discussed by you and Mr. Somekh in 1974?

25 A Yes, it was.

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1 4 lhmch

Curtiss-direct

2 Q What was that sum of money?

3 A \$1,200,000.

4 Q Did you ever have a meeting with Mr. Somekh
5 at or around October 4, 1974?

6 A Yes, we did.

7 Q Would you briefly tell the Court what the
8 purpose of that meeting was?

9 A There was a decided interest on both sides to
10 conclude this negotiation.

11 MR. PARKER: I object.

12 THE COURT: Yes. Just tell us who said what
13 to whom. Okay?

14 THE WITNESS: We met to endeavor to conclude
15 the negotiations.

16 MR. PARKER: I object, your Honor, to this
17 kind of characterization and this kind of conclusory
18 language by this witness.

19 THE COURT: All right, fine. We will get to it.
20 Just tell us who said what, all right?

21 THE WITNESS: Yes.

22 THE COURT: You talked to him about -- forget
23 about the personal things. I am sure that you must have had
24 a chat about personal things.

25 THE WITNESS: We did.

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1 5 lhmch

Curtiss-direct

2 THE COURT: Let's get down to a discussion
3 of the property located on the corner of -- where is it?
4 Nassau and -- what?

5 THE WITNESS: John.

6 THE COURT: -- Nassau and John.

7 THE WITNESS: The southeast corner there.

8 THE COURT: Did you say something to him about
9 it, or did he say something to you, to start off the
10 conversation?

11 THE WITNESS: We discussed the --

12 THE COURT: Don't tell us that. Tell us
13 who said what to him, as best you can.

14 THE WITNESS: We each wanted to settle the
15 situation, and we came to a figure of \$1,200,000 in our
16 discussion.

17 MR. PARKER: I object, your Honor.

18 He is not giving us the conversation.

19 THE COURT: I understand that, but we have
20 a lay witness, Mr. Parker. We are doing the best we can.
21 We will get to it.

22 You said that there was mention of a figure
23 of \$1,200,000.

24 THE WITNESS: Yes, sir.

25 THE COURT: Who brought that out? Did you or

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6 lhmch

Curtiss-direct

did Mr. Somekh?

THE WITNESS: Your Honor, it developed because of the requirements of a subtenant and a franchisee. There were three parties involved. The requirements --

THE COURT: Look, you said to him --

THE WITNESS: -- developed into one million two.

THE COURT: You said at some point, "Look, I am trying to get this thing resolved for the Federal Reserve Board," right?

THE WITNESS: Yes, sir.

THE COURT: Basically?

THE WITNESS: Yes.

THE COURT: What else did you say?

THE WITNESS: He agreed with me. He would like to get it resolved.

THE COURT: At that point what did you say? As best as you can remember.

THE WITNESS: I remember exactly what it was. The subtenant required \$600,000 at that point. Mr. Somekh felt that he was entitled to \$600,000 under the same circumstances, and I agreed with him, and I said, "Therefore, one million two is the figure," and he thought that was a reasonable figure, and so did I.

THE COURT: Where did this conversation take

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1 7 lhmch

Curtiss-direct

2 place?

3 THE WITNESS: In the Wall Street Club at
4 luncheon.

5 THE COURT: That's , on top of the Chase
6 Manhattan building?

7 THE WITNESS: That's correct.

8 THE COURT: Was there anybody else present?

9 THE WITNESS: No.

10 THE COURT: At that time you were an employee
11 of Ely Cruikshank?

12 THE WITNESS: No.

13 THE COURT: You had left them?

14 THE WITNESS: I am a real estate counselor
15 to the firm now that I am retired, and my office is there.
16 I am self-employed.

17 THE COURT: How did you come to represent
18 the Federal Reserve Board?

19 THE WITNESS: The Bank of New York. It is
20 the Federal Reserve Bank of New York.

21 THE COURT: Yes, the Federal Reserve Bank of
22 New York. I am sorry. I was imprecise.

23 THE WITNESS: I was called in by the bank back
24 in 1968 when they had space problems, and that resulted in
25 my assembling this block which Parklane was located on the

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corner, the corner building.

THE COURT: Don't go any further. That's how you ended up working with the Federal Reserve Bank of New York?

THE WITNESS: I represented them in acquiring the property.

THE COURT: That's working with them, isn't it?

THE WITNESS: It certainly is.

THE COURT: So you had this meeting.

When was the meeting?

THE WITNESS: October 4, 1974.

THE COURT: You said you wanted to get this resolved; is that right?

THE WITNESS: Yes.

THE COURT: Somehow or other you and Mr. Somekh came up with a figure of one million two?

THE WITNESS: That's correct.

(Continued on next page)

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2 THE COURT: After you came up with the figure,
3 who said what to whom then?

4 What did you say to him?

5 THE WITNESS: I said I am going to recommend
6 payment of a million two and you get me assurances that
7 you can settle your end of it for that amount.

8 THE COURT: When you say "your end of it" --

9 THE WITNESS: The other two parties involved.

10 THE COURT: You mean the subtenants?

11 THE WITNESS: And the franchisee, the sub-
12 tenant.

13 THE COURT: They are both subtenants?

14 THE WITNESS: There is a different relationship.

15 THE COURT: All right.

16 You are being a purist.

17 What happened after that?

18 THE WITNESS: I communicated my recommendations --

19 THE COURT: We are still at this luncheon
20 meeting.

21 THE WITNESS: That was it. He was going to
22 proceed on his side and I was going to proceed on mine
23 toward getting an agreement for the million two.

24 THE COURT: Is that what you said to him and
25 what he said to you?

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1 2 rkmch

Curtiss-direct

2 THE WITNESS: That is correct.

3 THE COURT: Go ahead.

4 Q Did you recommend to the Federal Reserve Bank
5 that it pay a million two to Parklane?

6 A Yes, I did.

7 Q Approximately when did you make such a
8 recommendation?

9 A The same day.

10 Q Were negotiations between yourself and Mr.
11 Somekh ever broken off at any time during 1974?

12 MR. PARKER: Objection as to form.

13 THE COURT: I will permit it.

14 A No, there were not.

15 Q Are the negotiations continuing today?

16 A Yes, sir.

17 Q Did the Federal Reserve, Mr. Curtiss, pay the
18 million two to Parklane in or about October of 1974?

19 A No, they did not.

20 Q Do you know of your own knowledge why they did
21 not?

22 A Yes, I do.

23 Q Would you explain that briefly to the Court?

24 A Yes. By that time --

25 MR. ORMSTEN: The question is withdrawn.

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3 rkmch

Curtiss-direct

THE COURT: Let him answer. You asked it.

A I will answer it briefly if I can.

MR. PARKER: I will object to this inquiry.

THE COURT: Now you object.

Rephrase your question.

MR. PARKER: I will object to the inquiry, the substance of it, if your Honor please. I don't know that any conversation that he is now going to be testifying to, if he is going to be testifying to any conversation, is beinding upon us at all. He hasn't placed us there.

THE COURT: I understand.

Now you withdraw your qu stion?

MR. ORMSTEN: No.

THE COURT: You want to rephrase it, at least?

MR. ORMSTEN: I would like to go back one question.

Q Did Parklane act on your recommendation -- did the Federal Reserve Bank act on your recommendation, to your knowledge?

A No.

Q Do you know, of your own knowledge, if the Federal Reserve Bank maintained its interest in this leasehold and in this property?

A Yes.

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MR. PARKER: Objection.

THE COURT: I will permit it.

MR. PARKER: Your Honor, I don't see how this can be possibly binding upon us in the way it's coming in.

THE COURT: I don't know.

Q Mr. Curtiss, do you know if the Federal Reserve Bank's plans for the property were changed in any way in October of 1974?

MR. PARKER: If your Honor pleases, again I must respectfully object to this kind of inquiry.

THE COURT: Let me ask the ultimate question. Who owned the building where this leasehold was?

THE WITNESS: The Federal Reserve Bank of New York.

THE COURT: That is enough.

Q Did you have any further communications with Mr. Somekh after October 4, 1974, concerning the subject of that meeting, that October 4th meeting?

A Yes.

Q When was that communication?

A We had frequent conversations about this.

Q Specifically --

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MR. PARKER: I move to strike the witness' answer as not responsive.

THE COURT: We are going to try and get it to be responsive.

After October 4th, when was the next time that you talked to him?

THE WITNESS: Talked to Mr. Somekh?

THE COURT: Yes.

THE WITNESS: Probably within a week.

THE COURT: How did you talk to him, in person or by phone?

THE WITNESS: I would say by phone.

THE COURT: Do you recall what the conversation was?

THE WITNESS: That I recommended the amount and that they had some price problems on their new building, to the extent they may not even build it. The figures were out.

THE COURT: All right.

What did Mr. Somekh say to you, if you recall?

THE WITNESS: He was very much interested in settling the matter.

THE COURT: What did he say?

THE WITNESS: "How are you making out with your

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1 recommendation?"

2
3 THE COURT: What did you say to him?

4 THE WITNESS: I then told him about the increase,
5 the escalation of the cost of the new building, and how
6 they were working to reduce costs.

7 THE COURT: What did he say to you at that
8 point?

9 THE WITNESS: "Let me know as soon as you have
10 some information." And I agreed.

11 THE COURT: And you said you will?

12 THE WITNESS: I said, "I sure will."

13 THE COURT: That was the end of the conver-
14 sation about the property down there, was it, or was
15 there something else?

16 THE WITNESS: It wasn't the end. There hasn't
17 been an end.

18 THE COURT: I am talking about --

19 MR. PARKER: I move to strike that.

20 THE COURT: "There hasn't been an end"?
21 It's already in. At this point it doesn't
22 matter.

23 We are talking about this one phone call.
24 Was anything else said during that one phone call?

25 THE WITNESS: No.

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1 THE COURT: Take it from there.

2 Q Mr. Curtiss, did you ever write or receive
3 any documents reflecting these negotiations?

4 A Yes.

5 MR. ORMSTEN: I display to the witness a
6 document previously marked as Plaintiff's Exhibit 32 for
7 identification, 36 for identification, and 37 for
8 identification.

9 Q Sir, what is Plaintiff's Exhibit 32D?

10 A It's a letter.

11 MR. PARKER: May I have a moment for that?

12 THE COURT: Yes.

13 MR. PARKER: That is 32?

14 MR. ORMSTEN: 32 for identification.

15 THE COURT: It's a letter dated October 7th.
16 From whom to whom?

17 THE WITNESS: I wrote it to Mr. Treiber of the
18 Federal Reserve Bank.

19 Q Did you write it at or about the date indicated
20 on the letter?

21 A Yes, I did.

22 Q I show you a document marked Plaintiff's 36
23 for identification and ask you what is that document?

24 MR. PARKER: I don't have that.

25 0000349

THE COURT: Give him a copy of it.

What is it, first? Can you identify it?

THE WITNESS: This is a letter from Mr. Somekh addressed to me. It's dated May 15, 1974.

Q Did you receive that letter at or about the time that it's dated?

A Yes, I did.

Q Did you receive it with the attachment, Mr. Curtiss?

A Yes, I did.

Q I show you a document previously marked --

THE COURT: Give the man a chance to read the letter.

MR. ORMSTEN: I was going to move the three of them as one document.

THE COURT: Give him a chance to read it.

MR. PARKER: Thank you, your Honor. I very much appreciate it.

THE COURT: Of all people in the courtroom, the guy that would like to finish up the fastest is me.

MR. ORMSTEN: Excuse me, your Honor.

Q I show you a document previously marked Plaintiff's Exhibit 37 for identification.

What is that document?

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2 A It's a letter.

3 Q Is that a letter that you received?

4 MR. PARKER: What is the letter?

5 THE COURT: We are going to find out.

6 THE WITNESS: It's dated May 25, 1974 from
7 Mr. Somekh addressed to me.

8 Q Did you receive that letter at or about the
9 date that is indicated thereon?

10 A Yes, I did.

11 MR. ORMSTEN: I exhibit that letter to
12 counsel.

13 I respectfully move Plaintiff's Exhibits 32,
14 36 and 37 for identification into evidence.

15 THE COURT: How about 37? Do you object to 37?

16 MR. PARKER: It seems to me, your Honor, at
17 this point, in view of the witness' testimony, I will take
18 an objection on the grounds of irrelevancy and immateriality.

19 THE COURT: It is received.

20 (Plaintiff's Exhibit No. 37 received in
21 evidence.)

22 THE COURT: How about 36?

23 MR. PARKER: For the sake of the record, I will
24 reiterate my same objection.

25 THE COURT: Just to bring me up to date, Mr.

0000351

2 Curtiss, who was Jo-Ray?

3 THE WITNESS: A subtenant, Jo-Ray Foods.

4 THE COURT: That is the delicatessen?

5 THE WITNESS: That is right.

6 THE COURT: How about 32?

7 MR. PARKER: 32, your Honor, I will object
8 to it unless there was some particular purpose. It was
9 not binding upon us, we never received it.

10 THE COURT: Why should I take it in, Mr.
11 Ormsten?

12 MR. ORMSTEN: If the Court please, I believe
13 that document, which is a letter prepared and written by
14 the witness approximately three days after a meeting to
15 which he has given some testimony, but to which he was
16 unable to give precise and specific and detailed testimony,
17 represents the most accurate and therefore the best
18 evidence of the issues and information in question,
19 and it is relevant because it pertains directly to a
20 central allegation in this action, that allegation being
21 that there were ongoing negotiations when it was represented
22 there were not. So here we have the best evidence of
23 such allegation and --

24 (Continued on next page)

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Curtiss - direct

THE COURT: What is wrong with the witness' testimony? Why don't you use this to refresh his recollection if need be?

MR. ORMSTEN: If the court please --

THE COURT: You can refresh his recollection from anything he writes on the back of a matchbook cover. He can certainly use a letter.

Q Would you review this letter, Mr. Curtiss, and after you have done so, I will ask you certain questions pertinent to it.

A All right.

Q Have you reviewed the document previously marked as Plaintiff's Exhibit 32 for identification?

A Yes, I have.

Q After reviewing the document, will you please tell the court if you can the sum of money which Parklane was to get in connection with your discussions, the amount the franchisee was to get and the amount the subtenant was to get?

MR. PARKER: If your Honor please, I object.

MR. ORMSTEN: Withdrawn.

Q Was Parklane to get any money or was Mr. Somekh representing that he wanted a certain sum of money as a result of the negotiations?

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2 THE COURT: Concerning the cancellation of the
3 leasehold on Nassau and John Street, the southeast corner.

4 MR. PARKER: I object to the inquiry.

5 THE COURT: I will permit it.

6 Q Was Mr. Somekh representing that Parklane desired
7 to get a certain sum of money in connection with the can-
8 cellation of the leasehold at Nassau and John Street?

9 MR. PARKER: Objection as to form.

10 THE COURT: I will permit it.

11 Did you hear the question?

12 THE WITNESS: Yes.

13 A The problem was not Mr. Somekh and what he would
14 receive. It was the sub-tenant and at that point we had
15 a written agreement --

16 MR. ORMSTEN: If the court please, that wasn't
17 the specific question.

18 THE COURT: I understand. Let the man try and
19 answer it.

20 THE WITNESS: That the sub-tenant at that point
21 was demanding of Mr. Somekh \$600,000. Mr. Somekh and I
22 had an understanding that he would receive as much as the
23 sub-tenant. That is how the million, two was developed
24 and he was handling the sub-tenant and the franchisee,
25 not I.

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Therefore, I knew the circumstances very well and also the fact that he was fair to his franchisee and therefore I agreed to recommend a million, two and he agreed to do his best to get the consent of the sub-tenant, the franchisee.

MR. PARKER: I move to strike the answer as not responsive. It's full of characterizations. It's not testimony. It cannot be properly deemed to be probative of facts that may be sought to be elicited here.

THE COURT: No. There are parts which are totally probative. There are parts which have characterizations but I can rule them out.

I will let it stand.

MR. ORMSTEN: If the court pleases, I would respectfully ask permission to ask of this witness two questions then make a renewed offer.

THE COURT: Yes.

Q Mr. Curtiss, did you prepare Plaintiff's Exhibit 32, this letter to Mr. Treiber at or about the date indicated?

A Yes.

Q Was that date three days after the meeting in question?

A That is correct. 0000355

1 rkjb 4
2 Q Was that letter accurate and correct at the time
3 that you wrote it?

4 A It was.

5 MR. ORMSTEN: Your Honor, I respectfully sub-
6 mit that in some degree and in some respects Mr. Curtiss
7 has not completely remembered all of the contents of this
8 letter and I submit it is a past recollection recorded and
9 is the best evidence and offer it into evidence.

10 MR. PARKER: Objection, your Honor.

11 THE COURT: Mark it in evidence and mark 36 in
12 evidence.

13 (Plaintiff's Exhibits 36 and 32 received in
14 evidence.

15 MR. ORMSTEN: I have no further questions of
16 this witness at this time.

17 THE COURT: Mr. Parker, keep your voice up, Mr.
18 Curtiss has a hearing difficulty.

19 CROSS EXAMINATION

20 BY MR. PARKER:

21 Q Mr. Curtiss, have you had occasion to meet in
22 the recent past with any persons from the New York office
23 of the Securities and Exchange Commission?

24 A Recent past, yes, sir.

25 Q How recent?

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2 A Today.

3 Q With whom?

4 A Mr. Ormsten.

5 THE COURT: You have to keep your voice up too,
6 Mr. Curtiss.

7 THE WITNESS: I will.

8 Q Did you have occasion to discuss the substance
9 of the testimony you were going to give today with Mr.
10 Ormsten?

11 A Yes.

12 Q Did you tell Mr. Ormsten today that in respect
13 of what you call the million, two recommendation you made
14 to the Federal Reserve Board, that after October 4, 1974,
15 the Federal Reserve Board did not act on that recommenda-
16 tion?

17 A That is correct.

18 Q And you told that to Mr. Ormsten, did you not?

19 A Yes.

20 Q Sir, for how long have you acted in the capacity
21 of a real estate consultant for the Federal Reserve Bank?

22 A Since 1968.

23 Q Was that about the time that you first contacted
24 Parklane in connection with its leasehold interest at
25 68-70 Nassau Street?

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2 A Yes, since that time.

3 Q Were you engaged in an endeavor to purchase the
4 leases on the premises located in the square block that
5 you referred to?

6 A There were only two or three that had to be
7 purchased of the some 90 tenants in those buildings.

8 Q Do you recall, sir, whether the Federal Reserve
9 Bank had allocated a certain amount of money with which
10 to purchase the leases that it wanted to purchase?

11 A I have no direct knowledge of the amount but I
12 presume they did.

13 Q Did anybody at the Federal Reserve Bank ever
14 tell you of the amount that had been set aside by the
15 Federal Reserve Bank for that purpose?

16 A No, sir.

17 Q Do you know, sir, whether the Federal Reserve
18 Bank has produced documents requested by the plaintiff
19 here?

20 A I do not know.

21 Q Were you ever shown any of the documents that
22 were Federal Reserve Bank filed documents?

23 A No, sir.

24 Q Now, sir, with whom did you have discussions
25 concerning the possible purchase of the leasehold interest

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1 of Parklane on behalf of Parklane, from the beginning of
2 the discussions that you did have?
3

4 A Mr. Treiber.

5 Q I am not referring to the Federal Reserve Bank.
6 I am speaking of the representatives of Parklane.

7 A Originally with Mr. Snyder who was an attorney.

8 Q Can you fix the year in which you began those
9 discussions?

10 A About 1969, I would say.

11 Q Is that your best recollection?

12 A Yes.

13 Q Have you had occasion to try to refresh your
14 recollection as to when you had those meetings?

15 A Yes.

16 Q When did you try to refresh your recollection?

17 A I have a note in my pocket. I can tell the
18 exact date.

19 Q Can you tell us the exact date?

20 A Yes. January 20, 1969.

21 Q What does your diary show for June 9, 1968?

22 MR. GARMANSKY: Object to that question, your
23 Honor.

24 THE COURT: I will permit it.

25 A I have no notation for 1968.

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2 Q Do you recall, sir, having testified under
3 subpoena in an investigation conducted by the Securities
4 and Exchange Commission?

5 A Yes.

6 J Do you recall, sir, having been asked the follow-
7 ing questions and giving the following answers --
8

9 MR. ORMSTEN: What page are you referring to,
10 sir?

11 MR. PARKER: Page 12.

12 "Q Now, would you tell us in what connection or what
13 circumstances you met Mr. Somekh?

14 "A I had been talking previously starting on June
15 19, 1968 with Leonard Snyder who was at that time their
16 counsel.

17 "Q Parklane's counsel?

18 "A Parklane's counsel, about their lease which
19 continued to December 31, 1978 on the corner store at
20 John and Nassau Street. The Parklane Company had a
21 franchisee by the name of David Smoller who operated the
22 business in the store and a sub-tenant who at that time
23 was called Del-Ray, Inc. that operated a luncheonette."

24 Q Do you recall having been asked those questions
25 and giving those answers?

A Correct.

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Q Can you tell us when you first met Mr. Somekh, if you recall?

MR. ORMSTEN: Objection. Asked and answered.

THE COURT: I will let him answer it again.

Go ahead.

A I would say it must have been 1969 or '70.

Q Was it at your request that you met Mr. Somekh, sir?

A I am not sure whether it was my request or he came with one of his men.

Q Do you by any chance have a note that would help to refresh your recollection?

A Possibly.

Q All right, sir.

A I have a note April 14, 1969 met with Mr. Snyder and Mr. Somekh.

Q Do you recall, sir, whether you asked to see Mr. Somekh or Mr. Somekh asked to see you?

A I don't recall that.

Q Do you recall at a point in time asking Mr. Snyder who the principal of Parklane was that you might see because the situation there was complicated by the presence of a sub-tenant and a franchisee?

A Undoubtedly.

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THE COURT: Undoubtedly you did?

THE WITNESS: Undoubtedly I did.

Q Do you recall the first meeting you had with Mr. Somekh present?

A Yes, I recall it.

Q Do you recall what was said?

A Yes.

Q Did you at that time make any offer of any monetary consideration for the purchase of the leasehold interest of Parklane at 68-70 Nassau Street?

A I offered \$500,000.

Q Did you make such an offer in writing, sir?

A No.

(Continued on next page.)

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2 Q When you testified before the Securities and
3 Exchange Commission in the investigation conducted, sir,
4 did you testify that at that meeting you had made an
5 offer of \$500,000?

6 A I don't know whether I did or not. I don't have
7 the testimony in front of me.

8 Q Let me inquire whether on the occasion of your
9 interrogation in the investigation referred to, you were
10 asked the following questions and gave the following
11 answers:

12 "A So you asked me what was discussed at the meeting.

13 "Q At that meeting.

14 "A I said a few years. Three or four years hence,
15 we may be interested in working out a fair arrangement to
16 both parties to secure possession of their premises.

17 "Q What do you mean by both parties?

18 "A What parties?

19 "Q You have just said fair to both parties. What
20 do you mean by that?

21 "A Fair to the tenant, Parklane, and the Fed.

22 "Q Which was Pierre Associates at the time?

23 "A Yes, Pierre Associates, at the time.

24 "Q Fine.

25 "A And I felt that they should know that this is

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the plan in the event they had an opportunity to move and would want to be released from the lease, they would have no problem with me, I would be glad to work out an arrangement to release them, and I would find a sub-tenant which would be our problem then, because I would cancel the lease."

Do you recall that, sir?

A Sounds reasonable. I probably did say it.

Q You don't have any doubt, do you?

A It's a fact. No.

Q Now, what is your recollection, sir, as to whether you made an offer on that occasion of \$500,000?

A My notes say it here.

Q Is that the only basis upon which you can state that you made an offer on that occasion of \$500,000?

A That's correct.

Q When you testified to the Securities and Exchange Commission, did you refer to your notes on that occasion?

A No. I didn't have the notes then. I had my files. I had my files, but I didn't have the transcript.

Q A transcript --

A I meant my --

Q A transcript as distinguished from a file?

A I meant this.

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THE COURT: Indicating your notes. Go ahead.

Q Was that transcript made from the files to which you referred?

A Yes, that's right.

Q You had the file with you on the occasion of your prior testimony, is that correct?

A Yes, that's correct.

Q Did you have occasion to refer to the file on that occasion?

A Yes.

Q Would you please tell us what it is in the entry to which you are referring that refreshes your recollection, if that's what it is doing, that you made a monetary offer of \$500,000 on the occasion of that first meeting with Mr. Somekh?

A I say I suggested \$500,000.

Q Now can you please tell me, sir, whether you have a recollection as to whether you did or did not testify to that \$500,000 figure before on the occasion of your prior testimony?

A The testimony speaks for itself.

THE COURT: Did you or didn't you? If you recall.

THE WITNESS: If I wasn't asked, I didn't testify.

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2 Q Do you recall that at a point in time thereafter
3 you had made a proposal to Parklane that they move from
4 the premises at 68-70 Nassau Street to another location
5 which you had available for them?

6 A Yes, I did.

7 Q When was that, sir?

8 A January 7, 1970.

9 Q What was the proposal that you had made at that
10 time?

11 A Mr. Israel and Mr. Snyder came to see me at that
12 time. I suggested that --

13 Q May I ask you, sir, whether it is possible for
14 you to answer my question without reading from your notes?

15 A Yes.

16 Q Thank you, sir.

17 A I suggested that we had a building, 24-26 Maiden
18 Lane, where a store could be made available, and being a
19 corner store it might interest them, because there they
20 would have no time limit restriction, such as they would
21 have where they are.

22 Q Did you propose that there be any monetary con-
23 sideration paid in the event they removed the premises at
24 68-70 Nassau Street, and can you answer my question with-
25 out referring to your notes?

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2 A Yes. Well, I don't have that in the notes any-
3 way. Yes.

4 Q Do you recall what that was, sir?

5 A No, I don't recall the amount. It was moving
6 costs, and probably to fix the premises for them.

7 Q Had Parklane indicated to you an interest in
8 moving?

9 A No.

10 Q They didn't ask you for any substitute premises,
11 did they?

12 A No, no.

13 Q Well, sir, in any event, the proposal that you
14 just described wasn't accepted, was it?

15 A Was not accepted.

16 Q It just died, didn't it?

17 A It wasn't accepted.

18 Q That means it died, didn't it?

19 MR. ORMSTEN: Objection, your Honor. Argumenta-
20 tive.

21 THE COURT: Yes. Sustained. Don't argue with
22 the witness.

23 Q Now, sir, when after the proposal that you made
24 that you just described involving the premises at Maiden
25 Lane did you next have any communications with Parklane,

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Curtiss - cross

333

if ever?

A Oh, yes.

Q All right, sir, can you tell me when?

A I can tell you when if I look at my notes.

THE COURT: Go ahead, look at your notes. Tell him when. Give him the exact date. Look at your notes.

THE WITNESS: You are talking about five years ago, you know.

THE COURT: Come on, look at them. Just tell us when.

THE WITNESS: May 21, 1969 was the next contact.

Q Wasn't it in November, 1970 that you had made the proposal for substitution of the Maiden Lane premises?

A No.

Q When was that proposal made?

A January 7, 1970.

Q When after that was your next contact with Parklane? You are still continuing to look at your notes, sir, is that correct?

A All right.

THE COURT: Yes.

A (Continuing) My notes would not necessarily include every contact unless something happened.

THE COURT: All right, but when is the next one

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your notes reflect?

THE WITNESS: August 10, 1970.

THE COURT: August 10, '70?

THE WITNESS: I was notified by Mr. Israel, counsel, that Mr. Snyder no longer was with Parklane and I should talk to Mr. Somekh.

Q When did you next have a contact with Parklane, sir? You are continuing to refer to your notes, is that correct?

THE COURT: Yes, he is.

A The next important date would be November 10, '70 when a Mr. Kates came into the picture as director of real estate.

THE COURT: Director of real estate where?

THE WITNESS: Parklane.

Q Do you recall, sir, again, your prior testimony before the Securities and Exchange Commission in which you testified that there was a lapse of a year and a half in any contact between you and Parklane?

A I don't recall the period.

Q And do you recall, sir, that on the occasion of your prior testimony you had testified that there was no discussion of any kind until May 2, 1972?

A No.

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2 Q And that you are in no hurry to acquire the
3 premises?

4 A That was correct.

5 Q And that you were aware of the fact that there
6 was a problem because there was a sub-tenant and a fran-
7 chisee complicated the thing about getting possession?

8 A That's right.

9 Q And didn't you testify that you felt that as a
10 tactic you had more to gain by not going to Parklane and
11 hoping that they would come to you?

12 A It is possible.

13 THE COURT: Why don't you give the exact questions
14 and answers, counselor.

15 MR. PARKER: I thought I'd save a little time,
16 your Honor.

17 THE COURT: You know, you have objected at
18 various times throughout this trial as to irrelevancy. I
19 just wonder what we are doing back, milling around in
20 1969 through '72 when the interesting part of this entire
21 thing happens in 1974. Think about it. Take ten.

22 (Recess.)

23 BY MR. PARKER:

24 Q Mr. Curtiss, do you remember a meeting in 1973
25 with a Mr. Gerald Adler who was acting on behalf of Jo-Ray,

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Curtiss - cross

336

2 a sub-tenant at the Parklane premises on Nassau Street?

3 A I could have. Once, I think.

4 Q Do you have a recollection in 1973 of having had
5 a conversation with a Mr. Adler acting on behalf of Jo-
6 Ray Foods in which he told you what it was that Jo-Ray
7 Foods wanted in order to surrender its lease?

8 A That's my recollection, yes.

9 Q The lease which Jo-Ray had was a sub-lease which
10 also expired December 31, 1978, isn't that so?

11 A Right.

12 Q That was the same date as the -- expiration date,
13 as the lease that Parklane had with the Federal Reserve
14 Bank, isn't that so?

15 A Yes, sir.

16 Q Do you recall what the amount was that Mr. Adler
17 indicated or told you he would want in order to surrender
18 his sub-lease?

19 A I could tell you if I looked at my notes.

20 Q All right, sir, I'd appreciate it.

21 A I think I have it. What year did you say that
22 was?

23 Q 1973, sir.

24 A Yes. Mr. Adler called on me on October 22, 1973
25 and said that he wanted \$1,200,000.

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Curtiss - cross

337

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2 Q Do you recall, sir, whether prior to that his
3 request or demand had been higher than one million, two?

4 A It was \$1,200,000, to my knowledge.

5 Q Do you recall whether he had originally demanded
6 one million, six?

7 A No, I never heard that figure.

8 Q Do you recall, sir, whether in your prior testi-
9 mony before the Securities and Exchange Commission you
10 testified to a figure of \$1,600,000 which Jo-Ray Foods
11 demanded in order to vacate the premises?

12 A I don't recall.

13 (Continued on next page.)
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Curtiss-cross

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2 Q Do you recall having testified as follows,
3 and this is at pages 32 and 33 of the transcript, and this
4 is you speaking, Mr. Curtiss, according to the transcript:

5 "I always refused to see Mr. Adler, but he came
6 in with Mr. Somekh and his counsel at this time, and he
7 said that Jo-Ray occupies one-half of the Parklane
8 premises and therefore -- and so wants \$1,600,000 to
9 vacate. I, of course, told them that this was highly out
10 of the question."

11 Do you recall having so testified, sir?

12 A If I said it, I said it, but I don't have
13 one million six in these notes.

14 Q Do you recall your testimony, sir, apart from
15 the notes?

16 A Must be.

17 Q Isn't it a fact, sir, that --

18 MR. ORMSTEN: Excuse me, your Honor. May we
19 have a clarification of the last question and answer?
20 The question was, "Do you recall," and the answer was
21 "Must be." May we have clarification?

22 THE COURT: What do you mean when you said
23 "must be"? "Must be" that you testified that way --

24 THE WITNESS: He said that I said that. I
25 said if it is in the testimony, I must have said it.

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But I have here in these particular notes one million two.

THE COURT: I don't care about your notes.

Do you recall --

THE WITNESS: I don't recall saying one million six. No, I do not.

MR. ORMSTEN: Thank you, your Honor.

Q Sir, this is a transcript of the testimony which you gave before the SEC on December 5, 1974.

Do you recognize it as such, sir?

A Yes, I do.

MR. PARKER: Your Honor, may we eliminate the need for marking this transcript?

THE COURT: Sure.

Q I call your attention to the testimony commencing at line 19 on page 32.

Would you read from page 32, line 19, to line 25?

A I didn't write this, so I can't say that I said that, because I didn't write it.

THE COURT: Just read it to yourself.

THE WITNESS: I will read it.

(Pause)

THE WITNESS: Yes, I read it.

Q Do you recall now, sir, that you so testified?

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Curtiss-cross

340

A No, I do not. I don't recall one million six.

THE COURT: Let me see that.

MP. PARKER: It starts at line 19, your Honor.

THE COURT: Mark this Court's Exhibit 1.

(Court's Exhibit No. 1 was marked.)

Q Mr. Curtiss, isn't it a fact that in October 1973 you and Mr. Trieber of the Federal Reserve Bank decided to give an ultimatum to Mr. Somekh to give an offer of \$800,000 as a specific offer, but in decreasing amounts for periods of delay?

A Yes, I recall that.

Q You had suggested that to Mr. Trieber, had you not?

A Probably I did.

Q Mr. Treiber thought it was an excellent idea, didn't he?

A I don't know.

Q Didn't you so testify to the SEC?

A Yes. He wrote the letter.

Q Didn't you testify to the SEC that you had suggested the ultimatum, and Mr. Treiber thought that was an excellent idea?

A I may have, yes.

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1 Q Is it your best recollection that you did?

2 A I would say yes.

3 Q You and Mr. Treiber thought that a letter from
4 the Federal Reserve Bank would be more effective than
5 a letter from you; isn't that so?

6 A Yes.

7 Q And such a letter was sent to Mr. Somekh on
8 October 9, 1973; is that right?

9 A That's correct.

10 Q I show you Defendants' Exhibit E for
11 identification, which is a letter dated October 9, 1973,
12 from Mr. Treiber to Mr. Somekh and ask you if that is
13 the letter to which you refer.

14 A That's right.

15 Q That's the letter which represented the written
16 offer of \$800,000; is that correct?

17 A At that time; correct.

18 Q When you say at that time, sir, could you
19 elaborate?

20 A Yes. There were other letters that I wrote.

21 Q But this is an \$800,000 offer in decreasing
22 amounts; isn't that so?

23 A That's correct.

24 Q Isn't it a fact, Mr. Curtiss, that there were
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Curtiss-cross

5 lhmch

were monthly decreases in the event that the offer of
\$800,000 was not accepted?

A That's what the letter says.

Q Isn't it a fact, sir?

A I don't know. It is what the letter says.

Q I will show it to you.

Can you tell us by what date, if there
were no acceptance of that offer, there would be zero
amount outstanding?

A This letter says after February 1, 1974 there
would be no payment.

Q Isn't it the fact, Mr. Curtiss, that as of
February 1, 1974, there had been no acceptance of the
offer as set forth in that October 9, 1973 letter; isn't
that so?

A That's right.

MR. PARKER: If your Honor please, I offer
the letter in evidence as Defendants' Exhibit E.

THE COURT: Sure.

Any objection?

MR. ORMSTEN: Your Honor, may I just have a
moment to look at the letter?

THE COURT: Sure.

(Pause)

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MR. ORMSTEN: No objection, your Honor.

THE COURT: All right. Mark it in evidence.

(Defendants' Exhibit E was received in evidence.)

Q Isn't it the fact that you had no discussions at all with Mr. Somekh concerning that offer?

A Possibly.

Q What is your best recollection, please, sir?

A My best recollection is that it would have been natural for Mr. Somekh and I to converse about it.

THE COURT: But you don't recall any particular -

THE WITNESS: No particular one, no, sir.

Q Do you recall when you testified before the Securities and Exchange Commission having given the following testimony, based upon the following questions, page 42:

"Q As of February 1, 1974, was there any acceptance by Somekh of the terms under that offer by Traiber?

"A No discussion at all, nor did I communicate with him.

"Q In other words, his offer just lapsed, according to Treiber's letter?

"A Yes."

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Do you recall that question and answer?

MR. ORMSTEN: Respectfully object, your Honor.

This is an attempt to impeach a witness who has not denied the essential facts he is sought to be impeached on.

THE COURT: Yes, I know. I watched it.

I will let him answer.

Did you give that testimony?

THE WITNESS: For what, just now, this question?

THE COURT: Yes. The question and answer that he just read to you.

THE WITNESS: Yes. I must have.

THE COURT: Okay.

Tell me, Mr. Witness, according to the letter, that offer lapsed a long time prior to your October 4th meeting with Mr. Somekh; right?

THE WITNESS: That's correct.

THE COURT: That's what I thought.

Go ahead, Counselor.

Q Did you thereafter, sir, after the lapse of that offer, inform Mr. Somekh that construction of a building by the Federal Reserve Bank would be no deterrent if the Parklane premises remained as they were?

A Yes, I did.

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1 8 lhmch

Curtiss-cross

2 Q Do you recall whether the subtenant reduced
3 its demand after the demand of one million two to which
4 you earlier referred?

5 A Yes, they did reduce the demand.

6 Q To what did they reduce the demand, do you
7 recall?

8 A To \$800,000, subsequently to \$600,000.

9 THE COURT: When did they reduce it to
10 \$600,000?

11 THE WITNESS: That was a letter that Mr.
12 Somekh sent to me. It was a letter from Mr. Coplon to
13 Mr. Somekh on May 16, 1974. He reduced his demand from
14 800 to 600.

15 THE COURT: And you were referring to your
16 notes in giving that answer; correct?

17 THE WITNESS: Correct.

18 THE COURT: Go ahead, Counselor.

19 Mr. Ormsten, while we have this hiatus, how
20 many more witnesses do you intend to call?

21 MR. ORMSTEN: We have no further witnesses,
22 your Honor.

23 THE COURT: Okay. Sit down. Let's go.

24 Q Mr. Curtiss, I show you a letter dated
25 March 18, 1974 from Mr. Somekh to you, together with a
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1 letter dated March 13, 1974 from a law firm, Hoffinger,
2 Friedland & Roth, signed by Richard Coplon, which
3 purports to be an enclosure to the letter of March 18,
4 1974, and ask you if you can identify those documents as
5 having been received by you on or about March 18, 1974.
6

7 THE COURT: They are already marked in
8 evidence.

9 THE CLERK: I believe that is Defendants'
10 Exhibit F for identification, your Honor.

11 MR. PARKER: Marked for identification as
12 Defendants' Exhibit F.

13 A Yes, I recall these.

14 MR. PARKER: I offer the two letters referred
15 to, your Honor, the one of March 13 and 18, 1974, as
16 Defendants' Exhibit F in evidence.

17 THE COURT: Is there any objection?

18 MR. ORMSTEN: May I see them?

19 (Pause)

20 MR. ORMSTEN: No objection, your Honor.

21 THE COURT: Mark them in evidence.

22 (Defendants' Exhibit F was received in
23 evidence.)

24 Q Defendants' Exhibit F was the written
25 instrument that informed you that Jo-Ray Foods, the

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1 10 lhmch

Curtiss-cross

347

2 subtenant, was demanding \$800,000 in order to vacate the
3 premises; is that right?

4 A At that time, yes.

5 Q Isn't it the fact, sir, that after you
6 received Defendants' Exhibit F you then reduced the offer
7 of \$800,000 to \$500,000; isn't that so?

8 A That's correct.

9 Q Didn't you, when you made the offer of
10 \$500,000, condition that on its acceptance by April 15,
11 1974?

12 A You are now talking about my letter to Mr.
13 Somekh?

14 Q Yes, sir.

15 A Of March 21st. But it was not that \$800,000
16 that we are talking about.

17 Q No, I am talking about an offer being made of
18 \$500,000.

19 A That's correct. That was a letter to Mr. --
20 my letter to Mr. Somekh dated March 21, 1974.

21 Q I show you a letter dated March 21, 1974 from
22 you to Mr. Somekh, copy to Mr. Treiber, which has been
23 marked Defendants' Exhibit G for identification, and ask
24 you if that's the letter that you wrote.

25 A Yes, it's my letter.

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Curtiss-cross

11 lhmch

1 THE COURT: You offer it, Counselor?

2 MR. PARKER: Yes, your Honor.

3 THE COURT: Any objection?

4 MR. ORMSTEN: No objection, your Honor.

5 THE COURT: Mark it in evidence.

6 (Defendants' Exhibit G was received in

7 evidence.)

8 Q Was that offer of \$500,000 ever accepted?

9 A No.

10 (Continued on next page)

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Q Did you thereafter restore the offer of \$800,000?
You are referring to your notes, now, sir?

THE COURT: Yes, he is.

A I have no particular notation here where I did
it --

Q Do you have a recollection, sir?

A It was a continuing discussion.

Q Do you have a recollection of having written a
letter stating that you were renewing the \$800,000 offer?

THE COURT: Do you have any independent recol-
lection? Don't look at your notes.

THE WITNESS: Yes, I would --

THE COURT: Mr. Curtiss, come on.

THE WITNESS: I will say I undoubtedly did. I
will answer it that way.

THE COURT: Okay.

Q At the time that you restored the \$800,000 offer,
what was the amount that Jo-Ray Foods, the sub-tenant, was
demanding?

THE COURT: If you know.

A You are talking about 1974 now?

THE COURT: That's right, yes.

Q Yes.

A Jo-Ray at that point, that's when they reduced

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Curtiss - cross

350

2 their offer from \$800,000 to \$600,000 -- their demand.

3 Their demand.

4 THE COURT: Got you the first time.

5 Q I show you Plaintiff's Exhibit 34, letter dated
6 May 16, 1974, from Mr. Curtiss, that's you, to Mr. Somekh,
7 and ask you if that's the letter in which you made the
8 \$800,000 offer?

9 A That's correct.

10 Q Did you condition that on acceptance by March
11 26, 1974, did you not?

12 A Yes.

13 Q Was that offer accepted by March 26, 1974?

14 A No, it was not.

15 THE WITNESS: I have it. I found it in my notes.

16 THE COURT: Okay.

17 Q You received the \$600,000 demand of the sub-
18 tenant in writing, did you not, sir?

19 A Yes. Mr. Somekh sent it to me.

20 Q That was conditioned on the acceptance by the
21 Federal Reserve Bank by no later than June 14, 1974, isn't
22 that so, sir?

23 A That is right.

24 Q And was it accepted, sir?

25 A It was not.

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2 Q You knew, sir, at the same time that the fran-
3 chisee was demanding \$300,000, is that correct?

4 A Mr. Somekh told me that.

5 Q And that was a total of \$900,000, isn't that
6 so, sir?

7 A Six and three is a total of \$900,000.

8 Q So that those two amounts exceeded the offer of
9 the Federal Reserve Bank by \$100,000, is that so, sir?

10 A That's correct.

11 Q Did you learn thereafter, sir, that Mr. Somekh
12 had obtained authorization from the sub-tenant and the
13 franchisee to present a combined proposal of \$1,200,000
14 to vacate the premises in 68-70 Nassau Street?

15 A I wasn't interested in their proposals to him.
16 I was only dealing with Mr. Somekh.

17 Q Did he advise you that he had authority from the
18 sub-tenant and the franchisee so that he could make a pro-
19 posal of one million, two for termination and cancellation
20 of the lease on the premises?

21 A That was at our October 4th luncheon, yes.

22 Q Sir, you received a letter, did you not, dated
23 June 27, 1974 from Mr. Somekh to you, so advising you?
24 I show you Plaintiff's Exhibit 30 in evidence.

25 A Yes, yes, I remember that. Yes, yes, this is

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2 correct.

3 Q You were then informed, sir, were you not, that
4 the figure was not a negotiable one, were you not?

5 A Yes.

6 Q And that it was necessary to know whether the
7 figure was acceptable to the Federal Reserve Bank by July
8 10, 1974?

9 A Yes.

10 Q Do you know whether at the time of the June 27,
11 1974 letter, which is Plaintiff's Exhibit 30, Parklane
12 was a public company, sir?

13 A I didn't know they were a public company.

14 Q You did not know it was a public company?

15 A No, I did not.

16 Q Did you know, sir, that the termination date of
17 the proposal set forth in Plaintiff's Exhibit 30 of July
18 10, 1974 was a date when Parklane was a public company?

19 A I did not know that.

20 Q Was the proposal of one million, two accepted,
21 sir?

22 A The proposal to me?

23 Q Yes. The one in the letter of June 27, 1974?

24 A No, sir.

25 Q You responded to Mr. Somekh's June 27, 1974

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letter, did you not?

A Yes.

Q You responded in a letter of July 1, 1974?

A Yes.

Q When you responded, you told Mr. Somekh in your language that whether the \$800,000 offer still holds is a conjecture, did you not?

A I did.

Q The letter wherein you so informed Mr. Somekh is the letter of July 1, 1974 that you wrote to Mr. Somekh, sir?

A Right.

Q That's Plaintiff's Exhibit 31, is that correct, sir?

A That's right.

Q You really meant, did you not, that the \$800,000 offer was withdrawn, didn't you?

MR. ORMSTEN: Objection.

THE COURT: He said what he said. I heard what he said and I will read into it what I read into it. Go on.

Q Mr. Curtiss, do you recall when you testified previously before the Securities and Exchange Commission having been asked these questions and having given these

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answers, page 61:

"Q Is this the letter you sent to Mr. Somekh?

"A Yes.

"Q Now, you stated in the letter, Mr. Curtiss, again, as you've testified to, you reminded him that the Fed was willing to pay \$800,000 for complete vacating, not a million, two, and then you stated 'whether this offer of \$800,000 still holds is a conjecture.'

"Now, Mr. Curtiss, did you ever tell Mr. Somekh the offer of \$800,000 is withdrawn?

"A No. This is a -- again, a tactic. I could have told him it was still good, but I had to hold something back."

Now, Mr. Curtiss, is it not the fact that on the same July 1st --

A No.

MR. GARMANSKY: Your Honor, may we read further?

THE COURT: No. Mr. Ormsten, do you have something to say?

MR. GARMANSKY: I apologize to the court.

MR. ORMSTEN: No, I do not, your Honor.

THE COURT: Go ahead.

Q Isn't it the fact, Mr. Curtiss, that on the same July 1, 1974, in connection with the amount of \$800,000 you

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2 in fact just had the word "withdrawn" in communicating
3 with the Federal Reserve Bank?

4 A No.

5 Q Wasn't \$800,000 the amount which was the top
6 consideration ever offered by the Federal Reserve Bank for
7 the vacating of the Parklane premises?

8 MR. ORMSTEN: Objection, your Honor.

9 THE COURT: I will let him answer. Go ahead.

10 A You say wasn't it?

11 Q Was that the top consideration, \$800,000, which
12 at any time had been offered by the Federal Reserve Bank
13 for vacating the Parklane premises?

14 A Yes.

15 Q That \$800,000 was the figure in Mr. Treiber's
16 letter of October 9, 1973, was it not?

17 A Yes.

18 Q That was the \$800,000 that was in your letter
19 of May 16, 1974, was it not?

20 A Yes.

21 Q Mr. Curtiss, I show you a letter dated July 1,
22 1974 from you to Mr. Lloyd, vice president of building
23 and planning, Federal Reserve Bank of New York, which has
24 been marked Defendant's Exhibit I for identification, and
25 ask you if you can identify that as a letter which you

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1 sent on or about that date?

2 A Yes, I sent this letter.

3 Q And you did use the word "withdrawn" in con-
4 nection with the \$800,000, did you not?

5 MR. ORMSTEN: Objection, your Honor. Is that
6 letter in evidence?

7 THE COURT: No, it is not in.

8 MR. PARKER: I am so sorry, your Honor. I do
9 offer it and I apologize.

10 THE COURT: I will read it myself. Mark it in
11 evidence. Do you object to it?

12 MR. ORMSTEN: May I see it a moment?

13 THE COURT: Sure.

14 (Pause.)

15 MR. ORMSTEN: No objection.

16 THE COURT: Mark it in evidence.

17 (Defendant's Exhibit I was received in evidence.)

18 THE COURT: Put the letter down. I will read it.
19 Don't worry about it. Go ahead. Come on.

20 MR. PARKER: I am trying to capsulize this
21 thing, your Honor, trying to shorten it up.

22 Q Do you recall, sir, testifying to a conversation
23 you had with Mr. Somekh on July 15, 1974?

24 A Yes. I talked to Mr. Somekh on July 15, 1974.
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2 Q Do you recall, sir, having testified about that
3 telephone conversation when you were interrogated by the
4 Securities and Exchange Commission in December, 1974?

5 A I don't recall my testimony, but you asked me a
6 question and I answered it.

7 Q Didn't you tell Mr. Somekh on the occasion of
8 that telephone call that you testified to that one million,
9 two is out of the question?

10 A No. I have no notation of that.

11 THE COURT: Do you have any recollection of it,
12 which is more important?

13 THE WITNESS: At that point, I would not say it
14 was out of the question, no.

15 Q Referring to the July 15, 1974 telephone call
16 that you testified you had with Mr. Somekh, I show you
17 Court's Exhibit 1 for identification, page 68, which is a
18 transcript of your testimony, the following, starting at
19 line 11:

20 "Q Any other parts of that telephone conversation
21 that you recollect?

22 "A No. I just told him that the bank would not
23 discuss their offer of one million, two.

24 "Q And that's what Mr. Somekh wanted?

25 "A All he was doing in telling me about the fran-

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chisees so that I would get the figure from one million to one million, two. What was the time period that you said?

"Q About July 16, 1974.

"A No, no, not at that point.

"Q Okay. You told Mr. Somekh on that telephone conversation, on July 15, 1974 --

"A Yes.

"Q -- that one million, two is out of the question?

"A That's right."

Do you recall that testimony, sir?

A No, I don't recall it, but I must have said it. It's down there.

Q You have no doubt that you said it?

A Unless they took it down wrong. I don't know.

MR. ORMSTEN: I respectfully object to the question as assuming a fact not in evidence and being argumentative.

THE COURT: No, I will let it stand. Go ahead.

MR. ORMSTEN: May I request as to the last colloquy a clarification? A number of questions and answers were read. I respectfully would request of opposing counsel a clarification. Were all the questions and answers just read in court offered as affirmative evidence or were

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they offered to refresh Mr. Curtiss' recollection as to all the questions and answers?

THE COURT: Or to impeach him, one or the other. Yes.

MR. ORMSTEN: We respectfully object to the testimony being offered as affirmative evidence and we respectfully object to it being offered to impeach, and I assume --

THE COURT: No, no.

MR. ORMSTEN: If I may just continue, your Honor, I assume it was offered only in respect to the one attempt to refresh the witness' recollection. We would ask that the reading of the colloquy be restricted to that limited point.

THE COURT: No. Go ahead. How much longer do you have?

MR. PARKER: I have been trying to cut it down drastically.

THE COURT: I don't want you to cut anything down drastically. My goodness, you are getting paid to fully represent your client. Half an hour? An hour?

MR. PARKER: I would say probably a half an hour, your Honor.

THE COURT: Let's pick it up on Monday. Monday

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at 10:00. I have a problem, something you ought to think about over the weekend. Okay? How come if there had been, according to your cross examination of this witness, a number of offers, counter-offers, withdrawals of offers, break off of negotiations, and so on and so forth, and assuming that your client had a reasonable expectation that the Federal Reserve Bank did not want to end up like Rockefeller Center with a Hurley's Bar on the corner, how come there was not mention of the possibility, at least, of continued negotiations in the proxy statement? It is an interesting question. Think about it.

MR. PARKER: Thank you, your Honor. I will.

(Court adjourned.)

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